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Sup. Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 199 89

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF F. E. McMASTER, DECEASED, PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1900.
CERTIORARI AND RETURN FILED APRIL 4, 1900.

(17,637.)

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, A. D. 1899, thereof, begun and held at the United States Court Room in the City of St. Louis, Missouri, on the first Monday in December, it being the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

United States Circuit Court of Appeals, Eighth Circuit.

Attest:
JOHN D. JORDAN,
CLERK U. S. CIRCUIT COURT
OF APPEALS EIGHTH CIRCUIT.

Be it remembered, that heretofore, to wit, on the third day of January, A. D. 1899, a transcript of record in pursuance of the Writ of Error directed to the Circuit Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, in a certain cause wherein Fred A. McMaster, Administrator of the Estate of F. E. McMaster, Deceased, was Plaintiff in Error, and The New York Life Insurance Company, Defendant in Error, which said transcript of record is in the words and figures following, to wit:

1 The United States of America,
Northern District of Iowa—ss.

Pleas before the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, at a term begun and holden at Sioux City in said District on the first Tuesday of October, A. D. 1895, before the Honorable O. P. Shiras, Judge of the Northern District of Iowa.

Fred A. McMaster, Administrator of the Estate of F. E. McMaster, deceased, Plaintiff,
vs. No. 317 Law.
The New York Life Insurance Company, Defendant.

Be it remembered, that heretofore, to wit, on the 4th day of October, A. D. 1895, there was filed in the foregoing entitled cause, a transcript from State Court for Woodbury County, Iowa, the said transcript being filed in the office of the Clerk of the United States Circuit Court in and for the Northern District of Iowa, Western Division, which transcript is in the words and figures following, to wit:

2 In the District Court of Iowa in and for Woodbury County.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, deceased, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

PETITION.

Count I.

Plaintiff for cause of action states:

That on or about the 5th day of February, 1895, he was appointed administrator of the estate of Frank E. McMaster, deceased; that letters of administration were issued from the Probate Court, of the District Court of Woodbury County, Iowa, to said Fred McMaster.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of Decemer, 1893, Frank E. McMaster, deceased, made a written application to the New York Life Insurance Company for five policies of life insurance of one thousand dollars ($1000) each; and that said defendant, the New York Life Insurance Company, executed on the 18th of December and delivered to the said Frank E. McMaster, deceased, on the 25th day of December, 1893, five policies of life insurance, numbered, 577,242,-3,-4,-5,- and 6 respectively of one thousand dollars ($1000) each, on the life of said Frank E. McMaster, deceased; wherein and whereby said defendant undertook and promised to pay, upon the death of said Frank E. McMaster, on said five policies, five thousand dollars ($5000), during the continuance of said policies; a copy of said policies and the written application for insurance is hereto attached, marked Exhibit "A", and made a part hereof; that on or about the 25th day of December, 1893, each of said policies heretofore mentioned were executed and delivered to said Frank E. McMaster, deceased, and the premium paid on or about the same time, said premium being the regular rate charged by said defendant for a year's insurance. That said policies provide that all policies which may be issued under the application for insurance shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent. That the authorized agent received said premium, as stated, on or about the 25th day of December, 1893. That said policies also provide that after said policies shall have been in force for three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days for which the premium remains due and unpaid. During the said month of grace, the unpaid premium, with interest, as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance; that on the morning of the 18th day of January, 1895, said Frank E. McMaster died of pneu-
3 monia. That the defendant herein was furnished with proofs of the death of said Frank E. McMaster, and the payment of the five thousand dollars ($5000), as provided by said five policies, was demanded by plaintiff. That said defendant has refused and still refuses to pay to the plaintiff herein the five thousand (5000) dollars, agreed and stipulated in said policies of insurance or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster, he had performed each and every condition of said policies as required of him to be performed.

Wherefore, plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000.00), with interest thereon, from the .. day of ....., 1895, and the costs of this action.

Count II.

That on or about the 5th day of Feb., 1895, plaintiff was appointed administrator of the estate of Frank E. McMaster, deceased. That letters of administration were issued from the Probate Court of the District Court of Woodbury County, Iowa, to the said Fred A. McMaster.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of December, 1893, Frank E. McMaster made a written application for life insurance in the New York Life Insurance Company. That at the time of signing said written application for life insurance, the words, "Please date policy same as application," were not written in said application for insurance, but that said words were written in by the agent of the New York Life Insurance Company, F. W. Smith, after said Frank E. McMaster, deceased, had signed said application, and without the knowledge or consent of Frank E. McMaster, deceased; that said defendant, the New York Life Insurance Company, executed on the 18th of Dec., and dlivered to the said Frank E. McMaster, deceased, on the 25th day of December 1893, five policies of life insurance, numbered 577242, 3,-4,-5,- and 6, respectively, of one thousand dollars ($1000) each, on the life of said Frank E. McMaster, deceased; wherein and whereby said defendant undertook and promised to pay upon the death of said Frank E. McMaster, on said five policies, five thousand dollars ($5000.00), during the continuance of said policies. Exhibit "A," attached in Count 1, is hereby made a part of Count II, except the part of said exhibit in the written application which states, "Please date policy same as application."

That on or about the 25th day of December, 1893, each of said policies heretofore mentioned, were executed and delivered to said Frank E. McMaster, deceased, and the premium paid on or about the same time, said premiums being the regular rate charged by said defendant for a year's insurance; that said policies provided that all policies which may be issued under the application for insurance shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent. That the authorized agent re-

ceived said premiums, as stated, on or about the 25th day of December, 1893; that said policies also provided that after said policies shall have been in force for three months, a
4 grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days for which the premium remains due and unpaid. During the said month of grace the unpaid premiums, with interest as above, remain an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amounts of the insurance. That on the morning of the 18th day of January, 1895, the said Frank E. McMaster died of pneumonia. That the defendant herein was furnished with proofs of the death of the said Frank E. McMaster, and the payment of the five thousand dollars ($5000.00), as provided by said five policies, was demanded by plaintiff.

That said defendant has refused, and still refuses to pay to the plaintiff herein the five thousand dollars ($5000) as agreed and stipulated in said policies of insurance, or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster, he had performed each and every condition of said policies as required of him to be performed.

Wherefore, plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000), with interest thereon from the .. day of ....., 1895, and costs of this action.

Count III.

The plaintiff further states that on or about the 5th day of February, 1895, plaintiff was appointed administrator of the estate of Frank E. McMaster, deceased, and that he is the duly authorized administrator of said estate.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of December, 1893, Frank E. McMaster, deceased, made a written application for life insurance in the New York Life Insurance Company. That said defendant, the New York Life Insurance Company, signed the policies hereinafter mentioned, on the 18th day of December, 1893, and delivered the same to the said Frank E. McMaster, deceased, on the 25th day of December, 1893, being five policies of life insurance

numbered 577,242,-3,-4,-5, and 6, respectively of one thousand dollars each, on the life of said Frank E. McMaster, deceased. Wherein and whereby the said defendant undertook and promised to pay on the death of said Frank E. McMaster, on said policies, five thousand dollars ($5000.00).

That said policies continued in force from the 25th day of December, 1893, for thirteen (13) months, by reason of the payment of one year's premium, and by reason of the provisions and conditions of said policies, providing for one month of grace, and by reason of the understanding of said parties, that said policies, by the payment of said premium, as hereinbefore stated, would be in force for thirteen (13) months, from the 25th day of December, 1893. Exhibit "A" attached in Count I, is attached hereto and made a part of Count III, and for the further reason that said policies were delivered to Frank E. McMaster, deceased, on the 25th day of December, 1893, and the premium paid on or about the same time, said premium being the regular rate charged by said defendant for a year's insurance. That said policies provided that all policies which may be issued under the application for insurance, shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent; that the authorized agent received said premium, as stated, on or about the 25th day of December, 1893.

That on the morning of the 18th day of January, 1895, the said Frank E. McMaster died of pneumonia. That the defendant herein was furnished with proofs of the death of the said Frank E. McMaster, and the payment of the said five thousand dollars ($5000) as provided by said five policies of insurance, was demanded by plaintiff. That said defendant has refused and still refuses to pay plaintiff herein the five thousand dollars ($5000) as agreed and stipulated in said five policies of insurance, or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster he had performed each and every condition of said policies, as required of him to be performed.

Wherefore plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000) with interest thereon from the ..... day of ..... 1895, and the costs of this action.

F. E. GILL,
Attorney for Plaintiff.

Filed Jun. 13, 1895. W. S. Belden, Clerk.

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EXHIBIT A.

Amount $1000

Number 512,382 The New York Life Insurance Company, by this Policy of Insurance,

Doth Promise and Agree

Age 26. to pay one thousand dollars, at its office in the City of New York, to the insured's executors, administrators or assigns, immediately upon receipt and approval of proofs of the death during the continuance of this policy of Frank E. McMaster, of Sioux City in the County of Woodbury, State of Iowa (herein called the insured).

Annual Premium $21.00. This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.

Incontestability. After this policy shall have been in force one full year, if it shall become a claim by death the Company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

Examined T. H. M.

The benefits and provisions placed by the Company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed.

In witness whereof, the said New York Life Insurance Company has, by its duly authorized officers, signed and delivered this contract this eighteenth day of December one thousand eight hundred and ninety-three.

JOHN A. McCALL,
President.

Ordinary Life Accumulation.

CHARLES C. WHITNEY,
Secretary.

7

Benefits and Provisions Referred to in This Policy.

Benefits at end of Accumulation period.

If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:

First. To continue the policy and receive the dividend then apportioned by the Company, either
(1) in cash, or
(2) in an annuity to be used in reduction of premiums, or to be taken in cash, or
(3) in additional paid up insurance, conditioned upon satisfactory re-examination.

Second. To exchange the policy for its entire value, as stated below (*), either
(4) in cash; or
(5) in an annuity for life; or
(6) in a paid-up policy. (No re-examination required.)

*(The said entire value of the policy consists of the guaranteed reserve, two hundred and thirty-nine ($239) and in addition thereto the dividend then apportioned by the Company.

The insured shall notify the company in writing, prior to the end of the accumulation period; which benefit is selected. Failing such notification the apportioned dividend shall be applied to the purchase of an annuity as stipulated in benefit (2) above.

Dividends.

No dividend shall be apportioned or paid on this policy, before the end of the accumulation period. If this policy is continued in force beyond the accumulation period, and if all premiums due have been paid, a dividend will be apportioned to the insured at the end of each period of five years thereafter.

Advances within Accumulation Period.

The Company will make advances as loans upon this policy at the fifth, tenth, and fifteenth anniversaries of the insurance, under the following conditions:

First. That premiums are paid in full to the time when the [load] is made, including the premium for the entire insurance year then beginning.

Second. That the aggregate amount of loans outstanding from the sixth to the tenth years inclusive shall not exceed $47, from the eleventh to the fifteenth years inclusive, shall not exceed $102; and from the sixteenth to the twentieth years, inclusive, shall not exceed $166.

Third. That the policy shall be duly assigned to the company as collateral security for the loans and deposited at the home office.

Fourth. That interest at the rate of five per cent per annum shall be paid upon all such loans at the anniversary of the insurance next succeeding, and annually thereafter until the loans are paid off.

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Fifth. That the loans shall be for such time as the borrower may elect, not longer however, than to the end of the accumulation period.

(Any indebtedness to the Company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

Powers not Delegated.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary, or secretary of the Company, and will not be delegated.

Payment of Premiums.

All premiums are due and payable at the home office of the Company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

Grace. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the Company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

Proofs of Death. Within one year after the death of the insured the Company must be furnished at the office in the City of New York, with proofs of death, which shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's present forms. If it is found that the age of the insured was understated in the application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Assignments. Any assignment of this policy must be made in duplicate, and both copies must be sent to the policy, paid-up insurance will be issued for the Company. The company has no responsibility for the validity of any assignment.

Non-forfeiture. After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, and provided the policy has not been terminated by death within the month of grace allowed in the payment of the premiums (1) the insurance will be extended for the face amount as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy paid-up insurance will be issued for the reduced amount provided in the said table; or (3) the policy will be reinstated within the said six months upon payment of the overdue premium with interest at the rate of five per cent per annum, if the insured is shown by evidence satisfactory to the Company to be in good health.

9

Table of guarantees, if payment of premiums is discontinued, provided there is no indebtedness against the policy, (pursuant to the insurance law (chapter 690, laws of 1892 of the State of New York).

If the premiums are paid—	(1) The insurance of $1000 (without participation in profits) will be extended—	or (2) The policy may be converted into non-participating paid-up insurance
to Dec. 26, 12, 1896	to March 12 May 26th, 1899	of $64 67
" " " " 1897	to June,..... 1901	of 84 90
" " " 1898	to Aug. April... 1903	of 105 114
to " " 1899	to July March.. 1905	of 126 137
" " " 1900	to " Feb..... 1907	of 147 160
" " " 1901	to Aug. Jan.... 1909	of 169 183
" " " 1902	to " Dec..... 1910	of 190 206
" " " 1903	to " " 19132	of 212 229
" " " 1904	to July " 19154	of 233 252
" " " 1905	to May " 19176	of 255 275
" " " 1906	to Feb. Oct.....19198	of 276 297
" " " 1907	to Oct. Aug..... 1920	of 298 320
" " " 1908	to Apl. Apl..... 1922	of 319 342
" " " 1909	lo Oct. Nov..... 1923	of 340 364
to " " 1910	to Feb. May.... 1925	of 361 386
" " " 1911	to May Oct..... 1926	of 382 408
" " " 1912	to Aug. Feb....19278	of 403 429

Policies continued in force beyond the accumulation period will be entitled in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance, on the same basis as that on which the above table is constructed.

10 Abstract (E. and O. E.) of the application for insurance in the New York Life Insurance Co.

1. Name (in full) of the person applying for insurance on his life. Frank E. McMaster.
2. A. Residence, State Iowa; County, Woodbury; Town, Sioux City; Street, 1008 Ia. street.
   B. Place of business; 503 Ia. Savings Bank, Sioux City, Ia.
3. A. Occupation or employment; if more than one, state all. A. Atty. at law.
   B. Are you married? No.
   Note: It is not a sufficient answer to state (for example) "merchant," mechanic," "salesman" or "clerk," the particular branch of business or trade is to be specified and full particulars given, especially where the occupation is in any way hazardous.
4. A. Place of birth, Cal. B. Race or nationality, white. C. Born on 10 day of July, 1867. D. Age nearest birthday, 26.

5. If you have any insurance on your life, state in what companies, when taken, the kinds of policies and their respective amounts.
Answer: I have no insurance except $3000 in New York Life Ins. Co.

6. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued as applied for?
B. If so, when, to what company, etc.?
For answer to other queries see copy with policy No. 582,256.

7. A. To whom is the insurance applied for to be payable in event of death? (Name in full:) Myself.
B. Present residence. C. Relationship to you.

8. If the application is for an endowment or limited endowment policy, to whom is the endowment to be payable at its maturity?
Note: This question refers only to policies issued on the endowment or limited-endowment premium-tables, not to policies issued on any life table.

9. A. Do you desire a policy on the "accumulation policy" plan as set forth in that policy form? Yes.
B. If so which accumulation period do you select? I select the 20-year accumulation period.
C. Do you desire a policy with "premium return" in case of death within the accumulation period? No.
D. If so is such return to be equal to one-half or all the premiums paid? Equal to .... premiums paid.

10. Sum to be insured $5000.
Five policies of $1000.00 each.
Please date policy same as application.

Premium payable) Annually.) Semi-annually.) Quarterly.

11 Note: Strike out the rates not desired.

On what table) Ordinary Life.) Life premium.) Endowment payable in ..... years.) Limited endowment payable in .... years.

I do hereby agree as follows: 1. That the statements and representations contained in the foregoing application, together with those contained in the declaration made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warrant being a condition precedent to and a consideration for the policy which may be issued hereon. 2. That inasmuch as only the officers at the home office

of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writin- and presented to the officers of said company, at the home office in this application. 3. That in any distribution of surplus or profits, the principles and methods which may be adopted by said company for such distribution, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. 4. That any policy which may be issued under this application shall not be in force, until the actual payment to and acceptance of the premium by said company, or an authorized agent, during my lifetime and good health. 5. That the contract contained in such policy and in this application, shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York. 6. That no suit shall be brought against said company under said contract after the lapse of two years from the time when the cause of action accrues.

Dated at Sioux City, Ia., this 12th day of Dec., 1893.

Signature of person applying
for insurance on his life.
(Write the name in full.)

Frank E. McMaster.

Witness,
Agent, F. W. Smith.
93-63.

12 Declarations made to the Medical Examiner of the New York Life Insurance Company.

1. Have you had, since childhood, any of the following complaints? Answer (yes or no) opposite each.

Apoplexy—No.	Insanity—No.
Asthma—No.	Jaundice—No.
Bilious Colic—No.	Paralysis—No.
Cancer—No.	Piles—No.
Dropsy—No.	Pleurisy—No.
Disease of brain—No.	Pneumonia—No.
Disease of kidneys—No.	Rheumatism—No.

Disease of liver—No. Scrofula—No.
Disease of lungs—No. Small-pox—No.
Disease of urinary organs—No. Spinal disease—No.
Fistula—No. Spitting or raising blood—No.
General Debility—No. Syphilis—No.
Gout—No. Yellow fever—No.

Give full particulars of any serious illness you may have had since childhood.

When were you last confined to the house by illness. How?

2. Have you ever had severe headache, vertigo, fits or any nervous or muscular trouble? No.

3. A. Are you subject to cough, expectoration, palpitation or difficulty of breathing?

b. Have you ever been? If so, to which, when, and full details? No.

4. Are you subject or predisposed to dyspepsia, dysentery or diarrhoea? No.

5. A. What is the name and residence of your physician?

b. When and for what have his services been required? No.

6. A. What other physician have you consulted?

B. When and what for? No.

7. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued as applied for?

B. If so, when, to what company, etc.? No.

8. Has any physician given an unfavorable opinion upon your life with reference to life insurance? If so state particulars? No.

9. The medical examiner must obtain full and clear answers to each of the following queries. Avoid

13 all indefinite terms:

	Age, if living.	Condition of Health.	Age at Death.	Cause of Death	How Long Ill.	Previous Health
Father	.....	.....	52	Ulceration of Stomach.	.....	Good.
Mother	58	Good.	.....	.....	.....	.....
Four Brothers	37, 32, 25, 16	All good.	.....	.....	.....	.....
Two Sisters	28, 21	Good.	.....	.....	.....	.....
Father's Father	.....	.....	70	Age.	.....	.....
Father's Mother	.....	.....	70	Age.	.....	.....
Mother's Father	.....	.....	65	Don't know.	.....	.....
Mother's Mother	.....	.....	65	Don't know.	.....	.....

10. A. Have any of the above or any of your uncles or aunts now or ever had, consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity or any other hereditary disease? A. No.
    B. If so, give full particulars of each case. B.
11. A. Are your habits at the present time, and have they always been, sober and temperate? A. Yes.
    B. To what extent do you use intoxicating drinks as a beverage? (Average amount daily.) B. Not at all.
    C. Are you now engaged in any way in the retailing of alcoholic liquors? C. No.
    D. Have you ever been so engaged? D. No.
12. A. Where have you resided "during summer and winter" during each of the last ten years? Iowa, Ill. and Mich.
    B. Do you contemplate changing your place of residence or making a journey? (Yes or no.) B. No.
    If yes to what place and when?
13. A. How long have you been engaged in your present occupation? A. 2½ yrs.
    B. What was your business prior to your present occupation? B. Student.
    C. Do you contemplate making any change, temporary or permanent, in occupation? (Yes or no.) C. No.
    If yes, when and to what?

I hereby declare, that the accompanying application to the New York Life Insurance Company, dated Dec. 12th, 1893, for an insurance on my life, was signed by me, and that I renew and confirm my agreement therein; and I also agree that I expressly waive all provisions of law forbidding any physician or other person who has attended or examined me, from disclosing any knowledge or information which he thereby acquired.

FRANK E. McMASTER.

14 (The policy is endorsed on the back as follows:)

No. 512382. Exhibit "A'". New York Life Insurance Company. Assurance on the life of Frank E. McMaster, amount $1000. ....., Agent; Gilbert W. Smith, Manager, Sioux City, Iowa.

15 In the District Court of Iowa, in and for Woodbury County, August Term, 1895.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, deceased, Plaintiff,

vs. Answer.

New York Life Insurance Company, Defendant.

The defendant says: that for answer to the plaintiff's petition in this action it denies each and every allegation therein contained.

Wherefore, it demands judgment for costs.

PARK & ODELL, Attorneys for Defendant.

Filed August 27, 1895. W. S. Belden, Clerk.

In the District Court of the State of Iowa in and for Woodbury County.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff.

vs. Petition for removal.

New York Life Insurance Co., Defendant.

To the Honorable District Court of the State of Iowa, in and for Woodbury County.

The petition of the New York Life Inurance Company, the defendant above named, respectfully shows to the Court:

First: That this is an action now pending in this Court, in which the above named Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, is plaintiff, and the above named New York Life Insurance Company is defendant.

Second: That this action was commenced on the 6th day of May, 1895, by service upon the defendant of the original notice herein.

Third: That your petitioner appeared in this action by its attorneys; that the time required by the laws of this state to answer the petition has not yet expired.

Fourth: That this is an action founded upon an alleged liability upon contract, to wit: upon five certain policies of life insurance, alleged to have been made by your petitioner, aggregating the sum of five thousand dollars ($5000), and the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2000.00), as appears by the petition herein.

Fifth: That this action involves a controversy between citizens of different states; that the plaintiff, Fred A. McMaster, administrator of the estate of Frank E. McMaster, de-

16 ceased, resided at the time of the commencement of this action, and still resides, in the City of Sioux City, in the County of Woodury, and State of Iowa, and said Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, was, at the commencement of this action and still is, a citizen of the State of Iowa. That your petitioner, New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, a corporation under and by virtue of the laws of the State of New York, that its principal place of business and home office and residence was, at the time of the commencement of this action, and is still, in the City of New York, in the County of New York, and State of New York, and that said New York Life Insurance Company was at the time of the commencement of this action, and still is, a corporation of the City of New York, and State of new York, and is a corporation [credited] by the laws of said state and no other state.

Sixth: That your petitioner offers herewith a bond with good and sufficient surety for its entry in the Circuit Court of the United States for the Northern District of Iowa, Western Division, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this action may be removed into the Circuit Court of the United States for the Northern District of Iowa, Western Division, and that this Court proceed no further in this action.

PARK & ODELL, Attorneys for Defendant.

State of Iowa,
Polk County—ss.

W. E. Odell, being duly sworn, says that he is one of the attorneys for the defendant herein; that the foregoing petition is true to the knowledge of the deponent, except as to matters therein stated on information and belief and as to those matters deponent believes it to be true; that the reason why this affidavit is made by deponent and not by said petitioner, is that said petitioner resides, or is at present, without this state.

W. E. ODELL.

Sworn to before me and subscribed in my presence by the said W. E. Odell, this 23rd day of August, A. D. 1895.

SUE H. VAN LIEW,
Notary Public in and for Polk County, Iowa.

Filed August 27th, 1895. W. S. Belden, Clerk.

17 Know all men by these presents: That we, the New York Life Insurance Company, of the City of New York, County of New York, and State of New York, and J. G. Rounds, of the City of Des Moines, and State of Iowa, are held and firmly bound to Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, of the City of Sioux City, County of Woodbury, and State of Iowa, their executors, administrators and assigns in the sum of two hundred and fifty dollars, lawful money of the United States of America, for which payment well and truly to be made, we do jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

In witness whereof, we hereunto set our respective hands and seals this 22nd and 24th days of August, in the year of our Lord one thousand eight hundred and ninety-five.

Now the condition of the above obligation is such, that whereas, the above bounden New York Life Insurance [--] is about to file in the District Court of the State of Iowa, in and for Woodbury County, a petition for the removal into the Circuit Court of the United States for the Northern District of Iowa, Western Division, of a certain suit now pending in said District Court of the State of Iowa, in and for Woodbury County, wherein Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, is plaintiff, and New York Life Insurance Company is defendant; now if the said New York Life Insurance Company shall enter into said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear in said Circuit Court of the United States and shall there enter special bail in said suit if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] NEW YORK LIFE INSURANCE CO.
[Seal] By CHAS. C. WHITNEY, Secretary.

Sworn to and subscribed before me this 22nd day of August, 1895. JOHN E. MOONEY,
Notary Public, Kings Co. Certificate filed in New York Co.

J. G. ROUNDS, Surety.

State of Iowa,
Polk County—ss.

I, J. G. Rounds, being duly sworn, depose and say that I am a resident of Polk County, in the State of Iowa; that I am the owner of real estate within Polk County in the State of Iowa, not exempt from execution and exclusive of all encumbrances to the value of one thousand dollars ($1000).

J. G. ROUNDS.

Subscribed and sworn to by the said J. G. Rounds, be-
18 fore me and in my presence, this 24th day of August, A. D. 1895.

SUE H. VAN LEW,
[Seal] Notary Public, in and for Polk County, Iowa.

Bond approved August 27th, 1895. F. R. Gaynor, Judge.
Filed August 27th, 1895. W. S. Belden, Clerk.

State of Iowa,
Woodbury County.

Be it remembered, that in the District Court of the State of Iowa, in and for Woodbury County, a Court of record, having and exercising general original jurisdiction in civil, criminal and probate proceedings, the following, among other proceedings, were had, to wit:

Fred A. McMaster, Admr.,
vs. No. 13545.
New York Life Ins. Co.

And now at this time, to wit, August 27th, 1895, this cause coming on for hearing, the plaintiff appearing by his attorney, F. E. Gill, and the defendant by its attorneys, Park & Odell, and Swan, Lawrence & Swan, and thereupon the defendant files its answer, and at the same time files a petition for removal, asking that this action may be removed into the Circuit Court of the United States, and that this Court proceed no further with the same.

And the defendant having filed its bond with proper sureties, conditioned that it will enter said Court with this action, and that it will pay all costs if awarded by said Court against it, and the Court having inspected said petition and bond, and being fully advised in the premises, finds that they are in form provided by law; that said defendant is entitled to the relief demanded, and therefore approved said petition and bond.

It is, therefore, ordered and adjudged by the Court that this cause be removed to the Circuit Court of the United States for the Northern District of Iowa, Western Division, and that the record be forwarded to said Court, as required by the statute in such cases made and provided.

Read, approved and signed in open court.
(Srg.) F. R. GAYNOR, Judge.

State of Iowa,
Woodbury County.

19 I, W. S. Belden, clerk of the District Court of the State of Iowa in and for Woodbury county, hereby certify that the foregoing is a true and correct copy of all the pleadings and

record entry in cause entitled Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, plaintiff, vs. New York Life Insurance Company, defendant, as full and complete as the same now appear on file and on record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of September, A. D. 1895.

[Seal]

W. S. BELDEN,
Clerk District Court.

Indorsed: No. 217 law. No. 13545 law. Fred A. McMaster, administrator, vs. New York Life Insurance Co. Pleadings and record entry. Filed Oct. 4, 1895. A. J. VanDuzee, Clerk.

20 And afterwards, to wit, on the 4th day of October, 1895, there was filed in the office of the clerk of said court in said cause, an amended and substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, Deceased, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

AMENDED AND SUBSTITUTED ANSWER.

To the Honorable Court aforesaid:

1.

Comes now the said defendant, and for an amended and substituted answer to the petition in this action says, that it denies generally each and every allegation in said petition contained, except those that are herein specially admitted, qualified or explained.

This defendant admits that said plaintiff was appointed administrator as alleged in said petition, and that letters of administration have been issued to him as such.

This defendant admits further that the said Frank E. McMaster deceased made a written application to said defendant for five policies of life insurance of one thousand dollars ($1000) each and and that said defendant executed and delivered to the said Frank E. McMaster, on the 12th day of December, 1893, five policies of $1000 each on the life of the said Frank E. McMaster, deceased.

2.

This defendant, for further answer, says that said application is dated the 12th day of December, 1893, and asked the issuing of five policies of $1000 each upon the life of the said Frank E. McMaster, deceased. Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued.

This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums, which extended the day of payment of premiums from December 12th, 1894, as in the policies issued to said Frank E. McMaster, deceased, late as the 12th day of January, 1895, but not later.

3.

This defendant for further answer says that payment of the premiums due upon said policies were not paid within the time prescribed as aforesaid, and that said Frank E. McMaster died on the 18th day of January, 1895, six days after said policies had lapsed and were forfeited for non-payment of premiums as required.

21 4.

For further answer this defendant says that notice was duly mailed to the insured at least fifteen days and not more than forty-five days before the said premiums were due upon said policies, and said notice stated the amount, and the date when the premiums on said policies were due, and that said policies would be forfeited if the premiums due on said policies were not paid within the time required.

5.

This defendant further answering says that by reason of the non-payment of the premiums due on said policies within the time prescribed by the conditions of said policies as aforesaid, all of said policies became lapsed, forfeited and void, and were so lapsed and forfeited before, and at the time of the death of the said Frank E. McMaster, deceased, and this defendant, therefore, is not liable for any amount whatever upon said policies.

6.

This defendant further answering said petition says that said application is a part of said policies, in each case, that said assured received and accepted said policies during his lifetime and had them all in his possession for a long time, and was aware and knew, or could have known, the contents in each policy.

That said assured had paid the premiums when said policies were delivered to him; that by reason of said assured's acceptance of said policies, his representative the plaintiff herein, is estopped from denying the date of said policies or claiming that said policies should have a different date from the application, and is estopped for the reasons above stated from claiming that said words, to wit: "Please date policy same as application" were not in said application when insured signed same, for by accepting said policies the assured waived said right to object, if said words were inserted, as alleged in petition after the signing of the application, which this defendant denies.

Wherefore, The defendant asks that the petition herein be dismissed, and that it have the costs of this action.

PARK & ODELL,
SWAN, LAWRENCE & SWAN,
Attorneys for defendant.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District, Ia., Western Division. Fred A. McMaster Administrator etc. Plaintiff vs. New York Life Ins. Co. Defendant. Amended and substituted answer. Filed October 4th, 1895. A. J. Van Duzee, Clerk.

22 And afterwards to wit on the 5th day of October, 1895, there was filed in the office of the clerk of said Court in said cause a reply, which reply is in the words and figures following, to wit:

In the Circuit Court of the United States for Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff,
vs Reply.
The New York Life Insurance Co. Defendant.

To the Honorable Court aforesaid, comes now the plaintiff, and for reply to defendant's amended and substituted answer, denies each and every allegation therein contained, except as hereinafter admitted or otherwise replied to.

Plaintiff admits that he was appointed administrator, and that letters of administration issued to him as such, and admits that Frank E. McMaster, deceased, made a written application to defendant for five policies for life insurance of One Thousand (1000) dollars each, and that defendant executed and delivered said policies to deceased, but expressly denies that said policies or either of them were executed or delivered on the 12th day of December 1893.

Plaintiff expressly denies that said request, if ever made, "to date policies on the 12th day of December 1893" was complied with, and alleges that defendant refused so to do, if ever requested, and by dating said policy and signing it on the 18th day of December 1893, the defendant is estopped from claiming that said policies went into force on the 12th day of December 1893.

And replying to the third defense, set up by defendant, plaintiff expressly denies that said policies lapsed and were forfeited for non-payment of premiums; and for further reply to the fourth defense set up by defendant, plaintiff expressly denies that Frank E. McMaster, deceased, had notice that said policies would be forfeited if the premiums due on said policies were not paid, and denies the notice given if any was the notice required by the laws of the state of New York, as required by said policies, and further alleges that it was the common practice of defendant to receive premiums after they fell due, and after more than one month had elapsed for the time of giving notice to pay premiums.

Plaintiff further alleges that said defendant is estopped by its own failure to give the notice of the payment of premiums required, and by the acts of its agents from claiming that said policies have lapsed.

Wherefore plaintiff renews his demand for judgment against defendant, as prayed in his petition herein.

F. E. GILL, Atty. for Plaintiff.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District of Iowa Western Division. Fred A. McMaster, Administrator of the estate of Frank E. McMaster deceased, Plaintiff vs The New York Life Insurance Company, Defendant. Reply. Filed October 5th, 1895. A. J.
23 Van Duzee, Clerk. By J. H. Bolton, Deputy.

And afterwards to wit, on the 24th day of April, 1896, there was filed in the office of the Clerk of said Court in said cause an amendment to substituted answer, which is in words and figures following, to wit:

In the Circuit Court of the United States Northern District, Iowa, Western Division.

Fred A. McMaster, administrator of the estate of Frank E. McMaster,

vs.

New York Life Insurance Co., Defendant.

Amendment to substituted answer.

Now comes the defendant, and by leave of the Court, files an amendment to its substituted answer by adding thereto the following:

The defendant further answering denies that there was any understanding or agreement between the parties that the said policy should be in force or the premiums should become due at any other time, manner or place, than as stated and expressed in said policy, nor was there any understanding or agreement that the said policy should be in force and binding for thirteen months from the 25th day of December, 1893, or any other time than that stated and expressed in the said policy. That it is expressly stipulated and agreed in said contract of insurance that the annual premiums therein should become due and payable on the 12th day of December of each and every year, and that after the said policy had been in force three months a grace of one month will be allowed in the payment of the premium and the policy should continue in force during the said month, and the said time of payment and conditions have never been changed, superseded or altered in any manner.

That the following provision in said contract are embodied therein and form a part of said contract of insurance:

No agent has power in behalf of the company to make or modify this or any contract of insurance to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts, signed by the president, vice-president, second vice-president, actuary or secretary and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as herein other wise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

24 After this policy shall have been in force three months, a grace will be allowed of one month in payment of subsequent premiums; provided that in all cases when this grace is availed of interest at the rate of five per cent per annum shall be paid to the company for the time deferred. During the month of grace the policy remains in full force.

That the payments of the premiums have not been made or in any manner waived or changed as therein contracted and the said policy had prior to the death of the said Frank E. McMaster, become void.

PARK & ODELL,
SWAN, LAWRENCE & SWAN,
Attys. for deft.

Indorsed: Circuit Court of United States, Northern District of Iowa, Western Division. Fred A. McMaster, administrator of estate of Frank E. McMaster, vs. New York Life Insurance Company. Amendment to substituted answer. Filed April 24th, 1896. A. J. VanDuzee, Clerk, By J. H. Bolton, Deputy.

And afterwards, to wit, on the 25th day of October, 1896, there was filed in the office of the Clerk of said Court in said cause a reply to amended and substituted answer, and amendment to substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff,

vs.

New York Life Insurance Co., Defendant.

Reply to amended and substituted answer and amendment to substituted answer.

To the Honorable Court:

Comes now the plaintiff, and for reply to defendant's amended and substituted answer and amendment to substituted answer, denies each and every allegation contained in said answers except as hereinafter admitted or otherwise replied to.

Plaintiff admits that he was appointed administrator, and that letters of administration issued to him as stated, and admits that Frank E. McMaster deceased, made a written application to defendant for five policies for life insurance of one thousand dollars each, and that defendant executed and delivered said policies to deceased, but expressly denies that said policies or either of them were executed or delivered on the 12th day of December, 1893.

25 Plaintiff expressly denies that said request to date policies on the 12th day of December, 1893, was ever made by deceased, and further alleges that said policies or either of them were not dated or signed until the 19th day of December, 1893, and that the defendant is estopped from claiming that said policies or either of them went into force on the 12th day of December, 1893.

Plaintiff expressly denies that said policies or either of them lapsed and were forfeited for non-payment of premium and plaintiff expressly denies that Frank E. McMaster deceased had notice that said policies would be forfeited if the premium due on said policies was not paid, and denies notice given, if any, was a notice required by the laws of the state of New York, as required by said policies, or as required by the law of Iowa.

Plaintiff further alleges that it was the common practice of defendant to receive premiums after they fell due, and after more than one month had elapsed after the time of payment.

Plaintiff further alleges that by the false and fraudulent insertion in the application of the words "Please date policy same as application" in the manner stated in plaintiff's petition, that the defendant is estopped from claiming that said policies, or either of them, have lapsed, and are estopped from claiming that the premium on said policies, or either of them was due and payable on the 12th day of December of each year.

Plaintiff expressly denies that Frank E. McMaster deceased, ever made the request in said application to "please date policies same as application" and alleges that said request was made without deceased's knowledge or consent, by defendant's authorized agent and after deceased had signed said application, therefore, the defendant is estopped from claiming that the policies, or either of them, have lapsed for non-payment of premiums on the 12th day of December.

Plaintiff further alleges that the defendant is estopped from claiming that said policies are forfeited, for the reason that during the month of December 1893, the defendant, through its agents, by the offer of a bonus from the defendant, given for all insurance placed in force and effect during said month of December, and year of 1893, authorized its agents to place in the application the words, "Please date policy same as application" and that this was customarily done by the agents of the company during the month of December 1893, with the knowledge of said defendant, after the application had been signed.

Wherefore, plaintiff alleges that defendant is estopped by its own wrongful act from claiming any benef' by reason of said request to date policy same as applicatio

Wherefore, plaintiff asks judgment against defendant as prayed in his petition herein.

F. E. GILL,
Attorney for Plaintiff.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District of Iowa, Western Division. Fred A. McMaster, administrator of the estate of Frank E. McMaster deceased, vs. New York Life Insurance Co. Reply to amended and substituted answer and amendment to substituted answer. Filed April 25, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

26 And afterwards, to wit, on the 12th day of December 1896, there was filed in the office of the Clerk of said Court in said cause, an amendment to amended and substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, Complainant,

vs.

New York Life Insurance Company, Defendant.

Amendment to amended and substituted Answer.

Comes now the defendant, and by leave of court files an amendment to the amendment to its substituted answer, by adding thereto the following:

The defendant further answering says, that the following provision is embodied in the said written application signed by the said Frank E. McMaster, which is attached to said policies of insurance and made a part thereof. Said provision is as follows, to wit:

"I do hereby agree that inasmuch as only the officers at the home office of said company in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company at the home office in this application."

That by the terms and conditions of said provision as agreed to as aforesaid, the insured thereby agreed that the whole contract of insurance should be expressed in writing in the application and policies to which said application is attached, and that, by virtue of said provision, all promises, agreements and conditions verbally expressed by the agent of said company to said assured, not embodied in writing in the said application, should be disregarded; and that the application as presented to the home office, together with the policies to which it is attached, constitutes, by said agreement, the entire contract between the parties.

PARK & ODELL,
Attorneys for Defendant.

Indorsed: No. 217, Law. U. S. Circuit Court, Nor. Dist. of Iowa, Western Div. Fred A. McMaster, adm., vs. New York Life Ins. Amendment to amended and substituted answer. Filed Dec. 12th, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

27 And afterwards, to wit, on the 5th day of April, 1897, there was filed in the office of the Clerk of said Court in said cause an amendment to petition, which is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff.

vs.

The New York Life Insurance Company, Defendant.

AMENDMENT TO PETITION.

To the Honorable Judge of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division:

Comes now the plaintiff herein, and first having obtained leave of the Court, amends his petition in the above entitled action, by alleging after the words "a part hereof" in the ninth line on page two of said Count I in said petition, and before the words, "that on or about the 25th day of December," the following:

That since the commencement of said action by bill in equity and by decree of said Court, the policies sued on herein were so corrected that each of said policies now reads,—"of the payment of a like sum on the 18th day of December, in every year thereafter during the continuance of this policy". That said decree was entered on or about the 6th day of January, 1897, in the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

Wherefore plaintiff demands judgment against the defendant herein for the sum of $5000, with interest thereon from the 18th day of January, 1895, and the costs of this action as prayed in his petition.

F. E. GILL, Attorney for Plaintiff.

Indorsed: In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division. Fred A. McMaster, &c., vs. New York Life Ins. Co. Amendment. Service of copy of within amendment accepted this 2nd day of April, 1897. Park & Odell. Swan, Lawrence & Swan. No. 217 Law. Filed April 5th, 1897. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

28 And afterwards, to wit, on the 27th day of September, 1898, there was filed in the office of the Clerk of said Court an amendment to petition, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator,
vs. No. 217 Law.
New York Life Insurance Company.

AMENDMENT TO PETITION.

Comes now the plaintiff, and with leave of Court first had and obtained, amends his petition herein, by adding thereto the following allegations:

That at the time said defendants delivered said policies to said McMaster, said McMaster took them and was about and began to examine them when said defendant there and then expressly stated, through its authorized agent, that said policies, and each of them, did insure said McMaster for thirteen months from the actual payment of the first premium thereon, and that said construction of said policies so made and given by said authorized agent of said defendant was by said agent represented to said McMaster to be, and in fact was, the construction given by said defendant to said agent with authority to so represent to said McMaster, whereupon, said McMaster, relying upon said construction and induced thereby, discontinued his examination and reading of said policies, folded them and placed them away for safe-keeping unread, and there and then, to wit, on December 25, 1893, in reliance upon said construction so made and given by said defendant, paid to said defendant the full amount of the first premium upon each of said policies, which said defendant received, and has ever since retained, and the terms of said policy, although some-

what indefinite and confused in statement, were by said McMaster believed to be as so then construed to him by the defendant, and in reliance thereon, he then paid his said premiums, and the defendant is now bound thereby and cannot now be heard to deny or repudiate the said construction and should be held, barred and estopped from placing any other or different construction thereon to the prejudice of said McMaster, or the plaintiff herein.

F. E. GILL, Attorney for Plaintiff.

No. 217 Law. Circuit Court of the United States for the Northern District of Iowa, Western Division. Fred A. McMaster, Admr., vs. New York Life Ins. Co. Amendment to Petition. Filed Sept. 27, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

29 And afterwards, to wit, on the 27th day of September, 1898, there was filed in the office of the Clerk of said Court in said cause, an amendment to reply, which amendment is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator,
vs. No. 217 Law.
New York Life Insurance Company.

AMENDMENT TO REPLY.

Comes now the plaintiff, and by leave of Court first had and obtained, amends his reply herein by adding thereto the following allegations.

That at the time said defendant delivered said policies to said McMaster, said McMaster took them and was about and began to examine them, when said defendant there and then expressly stated, through its authorized agent, that said policies, and each of them, did insure said McMaster for thirteen months from the actual payment of the first premium thereon, and that said construction of said policies so made and given by said authorized agent of said defendant was by said agent represented to said McMaster to be, and in fact was, the construction given by said defendant to said agent with authority to so represent to said McMaster, whereupon said McMaster, relying upon said construction and induced thereby, discontinued his examination and reading of said policies, folded them and placed them away for safe-keeping unread, and there and then, to wit, on December 25th, 1893, in reliance upon said construction so made and given by said defendant, paid to said defendant the full amount of the first premium

upon each of said policies, which said defendant received and has ever since retained, and the terms of said policy, although somewhat indefinite and confused in statement, were by said McMaster believed to be as so then construed to him by the defendant, and in reliance thereon, he then paid his said premiums, and the defendant is now bound thereby and cannot now be heard to deny nor repudiate the said construction and should be held, barred and estopped from placing any other or different construction thereon, to the prejudice of said McMaster, or the plaintiff herein.

F. E. GILL, Attorney for Plaintiff.

Indorsed: No. 217 Law. Circuit Court of the United States for the Northern District of Iowa, Western Division. Fred A. McMaster, Admr., vs. New York Life Ins. Co. Amendment to Reply. Filed Sept. 27, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

30 And afterwards to wit, on the 5th day of October, 1898, there was filed in the office of the Clerk of said Court in said cause, an answer to Amendments, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased,

vs.

New York Life Insurance Company, Defendant.

ANSWER TO AMENDMENTS.

Now comes the defendant, and for answer to the amendments to the petition of the plaintiff filed herein on the 27th day of September, 1898, denies each and every of the allegations therein contained.

SWAN, LAWRENCE & SWAN,
W. E. ODELL, Attorneys for Defendant.

State of Iowa,
Woodury County—ss.

J. S. Lawrence, being duly sworn, on oath says that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing answer to amendments, and know the contents thereof, and the statements and allegations there in contained are true as he verily believes.

J. S. LAWRENCE.

Sworn to before me and subscribed in my presence by the said J. S. Lawrence this 17th day of November, 1898.

ARNOLD L. FRIBOURG,
Notary Public in and for Woodbury County, Iowa.

Indorsed: Circuit Court of United States, Northern District of Iowa, Western Division. Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, vs. New York Life Insurance Company. Answer to Amendments. Filed October 5th, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

And afterwards to wit on the said 5th day of October,
31 1898, there was filed in the office of the Clerk of said Court in said cause a waiver of Jury, which is in the words and figures following to wit:

In the Circuit Court of the United States Northern District of Iowa Western Division.

Fred A. McMaster, Admr.
vs. No. 217 Law. Stipulation.
New York Life Ins. Co.

It is hereby stipulated and agreed that the jury is waived in the trial of the above entitled case.

F. E. GILL and
H. J. TAYLOR, Attys. for Plff.
W. E. ODELL and
SWAN, LAWRENCE & SWAN
Attys. for defendants.

Indorsed: No. 217 Law. In the Circuit Court of the United States Northern District Western Division. Fred A. McMaster Adm'r vs New York Life Ins. Co. Stipulation to waive Jury. Filed Oct. 5, 1898. A. J. Van Duzee, Clerk.

32 And on the 7th day of December A. D. 1898, there was filed in the office of the Clerk of said Court in said cause, a written opinion of the Court, together with the findings of fact in this case, which is in the words and figures following, to wit:

In the United States Circuit Court in and for Northern District of Iowa, Western Division, October Term, 1898

Fred A. McMaster, Administrator
vs. Law.
New York Life Insurance Company.

By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff Fred A. McMaster [—] when the suit was brought and, is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased having been ap-

pointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County Iowa.

2nd. That the defendant, the New York Life Insurance Company [—] when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal office and place of business in the City of New York in the state of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City Iowa, solicited Frank E. McMaster to insure his life in that Company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading "Benefits and provisions referred to in this policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

33 4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were

written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York city, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and
34 if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as he understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City told him the policies issued by the Union Central Company had been received and in reply McMaster said, "All right, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would

continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

35 15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

SHIRAS, District Judge.

A suit in equity was brought in this court by the administrator of the estate of Frank E. McMaster against the defendant Insurance Company praying a reformation of the policies in question, on the ground that the provision inserted therein, making the second annual premiums payable on the 12th day of December, 1894, was not in accordance with the agreement of the parties and upon the hearing of that case this Court held that under the rules of construction applied to contracts of this character, the plaintiff could recover at law thereon, but as the evidence clearly proved that the application signed by McMaster had been changed after he signed it by the interlineation of the words, "Please date policy same date as application," this interlineation being made by the agent of the defendant company without the knowledge or assent of McMaster, which interlineation, made for the benefit of the agent of the defendant company, and against the interest of the applicant McMaster, had

caused the defendant, when issuing the policies to make the second year's premium payable on December 12, 1894, although the policies were dated December 18 and not delivered until December 26th, 1893, the policies ought to be reformed to accord with the actual agreement of the parties. McMaster, administrator, vs. New York Life Ins. Co., 78 Fed. Rep. 33.

Upon appeal to the Circuit Court of Appeals for this circuit the decree of reformation was reversed, that Court holding that the policies in the form in which they were delivered must be held to represent the contract of the parties; the Court further expressing the opinion that no recovery could be had thereon at law or in equity. New York Life Ins. Co. vs. McMaster, 87 Fed. Rep. 63.

36 The case at law is now before the Court, the question being whether a recovery can be had upon the policies in their present form and under the facts now proven by the evidence.

The policies are dated December 18th, 1893. They were delivered and one annual payment of twenty-one dollars was then paid on each policy. This payment and the delivery of the policies put in force contracts for insurance good, not for one year only, but good for the lifetime of McMaster. Thus in Insurance Co. vs. Statham, 93 U. S. 24, it is said: "We agree with the court below, that the contract is not an assurance for a single year, with the privilege of renewal from year to year, by paying the annual premium, but that it is an entire contract for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

In Thompson vs. Insurance Co., 104 U. S. 252, it is ruled: "We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue; it is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances.

It is always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

Forfeitures are not favored, either at law or in equity, and to sustain the right to declare a contract, which has gone into effect, forfeited by reason of a subsequent failure to perform its conditions, it is incumbent on the party pleading the forfeiture to clearly establish the defense, and in the case of contracts, like insurance policies, wherein the assured has no voice in the selection of the terms used, the construction must be

against the party who prepared the contract, and furthermore if there be [ground] in the policy provisions which are inconsistent or contradictory, force must be given to those that sustain, rather than to those which would forfeit the contract.

Thus in National Bank vs. Insurance Co., 95 U. S. 673-678, it is ruled: "But without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of applicant's statements to be a condition precedent to any binding contract, the Court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule.

Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured, under a valid contract of insurance. It is its own language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

In this case on page 675 it is said, "The entire application having been made by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in the instrument. The policy and application to-
37 gether therefore, constitute the written agreement of insurance; and in ascertaining the intention of the parties, full effect must be given to the conditions, clauses and stipulations contained in both instruments."

In the policies sued on in this case, the applications are attached to the policies and are expressly made part thereof and therefore full effect must be given to the stipulations and provisions therein contained.

It is a familiar rule in the construction of contracts that the Court should, so far as possible, place itself in the position the parties occupied when the contract was entered into and to this end, it may follow the successive steps which the evidence proves were taken by the parties themselves when entering into the contract which is before the Court for construction.

The policies sued on recite on their face that they are made in consideration of the provisions of the application and it is well known that the making[—]the application precedes the issuance of the policy, so we turn to it in the first instance to ascertain, from its provisions, what the contract was which the parties proposed to enter into. The application contains the

usual questions as to the age of the party, his previous condition of health and other like matters and then clause 10 required a statement of the sum to be insured, of the premiums payable, whether annually, semi-annually, or quarterly, and on what table the premium is to be calculated, whether on that of ordinary life, endowment or limited endowment. The applicant, in the mode pointed out on the application, stated that he desired insurance in the sum of $5000 in the form of five policies of $1000 each, the premiums to be payable annually, the amount thereof to be calculated on the ordinary life table, it being also stated that the policies issued on these applications should not be in force until the first premiums thereon were paid to the company or its agent. As is well known from the common custom of insurance companies, and as appears from the form of the application prepared by the defendant company, a choice is given to the applicant to determine whether the premiums are to be paid at intervals of a quarter of a year, of half a year, or yearly and the amount of each payment is fixed by the selection made by the applicant. So also a choice is given to the applicant to determine whether the payment of premiums is to be continued during the lifetime of the assured or is to cease at the end of a named period of years, the amount of each premium being affected by the choice made in these particulars. When the insurance company submits to the party to be insured, as was done in this case, a form of application which required the applicant to determine the table according to which the amount of the premium is to be calculated, and also the time when payable, whether quarterly, semi-annually or annually, and the applicant makes his selection in these particulars, and the policy is issued upon the basis of the application certainly both parties must be bound thereby.

Thus in this case when the company submitted the application to the assured for the purpose of having him determine whether the payment of the premiums should be made quarterly, semi-annually or annually, and also upon what table of rates the premiums should be calculated and the assured, in the manner required by the application submitted to him, declared that the premium was to be paid annually, the amount to be calculated on that basis by the ordinary
38 life table, and thereupon the company issued the policy, making this application part of the contract between the parties, what was the result? The agreement of the parties was that the first premium was to be paid in advance, that is, the contract of insurance was not to take effect until the premium was paid. It was also agreed that the premiums were to be paid annually, that is each subsequent premium was to become due and payable after the lapse of one year

from the time the preceding premium became due, and the amount of each yearly payment was to be calculated on the basis of the ordinary life table. Naturally the next question that would arise would be as to the effect of a failure to pay any of the premiums coming due after the policy had become effectual. Unless the contract contains a provision authorizing a forfeiture thereof for non-payment of premiums, a policy of life insurance which has once gone into effect will not be terminated by the failure to pay subsequent premiums.

In such case the only right the insurance company has is to set off against the amount due on the policy the amount of the unpaid premiums with interest thereon from the time each payment came due. Hence it is that the life companies make provision for forfeiture for non-payment of premiums under certain terms and conditions. The evidence in this case shows that this question of the right of forfeiture did in fact arise and it was answered by pressing on the attention of McMaster the provisions found under the head of "Benefits and Provisions referred to in this Policy," in which it is provided that premiums are due and payable at the home office of the company or to agents holding properly signed receipts it being then stated. "If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void and all payments previously made shall remain the property of the company."

"After this policy shall have been in force three months a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premiums remain due and unpaid. During said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance." When the company in the form of the application submitted to McMaster stated that the policy would not become binding until the first premium was paid, the company declared that the first premium must be paid in advance, that is, at the time the policy would go into effect, but as to the subsequent premiums the company gave McMaster the right to say whether they should be made payable quarterly, semi-annually or annually, and when he made the choice agreeing to pay the same annually that fixed the times at which the subsequent premiums were to come due, and when the company accepted this application and made it not only a part of, but the very basis of the contract of insurance, it seems clear that the company must be bound by its terms. The choice given to McMaster in selecting the mode of pay-

ment of the premiums gave one year as the longest limit. He could select a year, or a less period, that is a quarter or a half year. By electing to pay the premiums annually, McMaster indicated that his purpose was to have a year's interval between the dates when payment could be demanded of him, and by issuing the policy on an application thus worded, by
39 calculating the premiums on the basis of annual payment and stating on the face of the policy, that the amount of the annual premium was $21, on each policy, and by accepting that amount from McMaster, the company clearly agreed on its part, that after the taking effect of the policies, by the payment of the first annual premium, the payment of the subsequent premiums could only be demanded after the lapse of one year from the date when the preceding payment came due.

The company, by calculating the premiums on the basis of annual payments, and by demanding and accepting from McMaster one full year's premium as the payment necessary to be made to put the policies in force, put its own construction on the application and thereby showed that it understood that it was entitled to demand payment of the premiums by yearly installments of $21 each, and as McMaster had in writing on the face of the application, stated that he wished the premiums to be made payable annually, there can be no doubt that both parties understood that the first premium was to be paid in advance in order to give life to the contract and that the subsequent payments were to be made yearly thereafter. The company, at its home office, concluded to accept the risk and thereupon issued five policies, dating them December 18, 1893, and forwarded them to Sioux City, where they were delivered to McMaster on December 26th, he paying the first year's premiums on the delivery of the policies. Granting the contention of the company, that under the usual practice in such matters, the payment, although actually made on the 26th, is deemed to have been made on the day of the date of the policies, that being the time when the company decided to accept the risk, then the situation would be this: on the 18th of December 1893, the company entered into a contract of insurance with McMaster, in which it was agreed that the premiums were to be paid annually, and the company on the 18th day of December, received the first year's premium in full, and delivered the policies. Suppose at the end of three months the company had demanded of McMaster, the payment of a further or second premium, would it not have been open to him to reply, that the agreement was that the payments were to be made annually; that the first payment had been made and the policy was dated December 18th, and therefore the next payment was not due or demandable until the expiration

of a year from that date. Could the company in response thereto be permitted to aver, It is true when negotiations touching this insurance were pending, we required of you to determine the mode in which the premiums were to be calculated and to be made payable. It is true, that in the application submitted to you for that purpose, you stated that the payments were to be made annually and were to be calculated according to the ordinary life table, on the basis of yearly payments. It is true that we issued the policies on the basis of the application signed by you and expressly made it a part of the contract between us. It is true, we calculated the amount of the premiums to be paid on the basis of yearly payments. It is true, that on the face of the policies, we stated that the annual premium was $21 on each policy. It is true that when we delivered the policies to you we demanded and received from you one full year's premium, and thereupon delivered to you the policies they being dated December 18, 1893. It is true that only three months from that date has
40 elapsed, but we are entitled to now demand payment of another premium, because we wrote in on the face of the policies a provision which makes the second premiums payable at the end of three months, and you accepted the policies in this form and therefore unless you now pay this second premium we will declare the policies forfeited, and we will retain for our own benefit, the full year's premiums paid by you, although three months only of that year has elapsed. Would a court either of law or equity, be justified in so construing the contract of the parties, as to permit a forfeiture in case the assured did not pay the second premium at the end of three months?

It is the well-settled rule that in construing a contract all parts and provisions thereof are to be considered. What constitutes the contract of insurance upon which the rights of the parties in this case depend. This question is answered by the Supreme Court in the case, already cited, of The National Bank vs. Insurance Co., 95 U. S., 673, wherein it is declared that "The entire application having been made, by express words, a part of the policy it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments."

Taking up, then, for consideration the contract between the parties, we find in one portion of it an express provision that the premiums to be paid are to be paid annually, and that the

amount thereof is to be calculated on that basis according to the ordinary life table. Turning to another portion of the contract we find a provision which requires the second and subsequent premiums to be paid at periods less than one year from the date of the contract and from the time when the first payment was made. Under the first provision the assured cannot be required to pay the second premiums, until after the lapse of one year from the date of the contract. Under the second provision payment of the second premium is demandable in a period of less than one year. These provisions are clearly inconsistent and contradictory. The rules of construction in case contradictory provisions exist in the same contract are well settled.

Where, as is the fact with reference to insurance contracts, one party prepares the form of the contract and requires the other party to accept it as thus prepared the construction thereof must be against the party who prepared the contract. If possible, the contract must be so contrued as to sustain it and not to defeat it.

If the parties, by their own action, have agreed upon a construction of the contract, that may be followed as the guid · to the intent of the parties.

When the company, having issued the policies sued on, took action thereon, it demanded from McMaster a full year's premium and he paid the same and thus both parties clearly showed that as they understood the contract, it was based upon the payment of annual premiums. That this was the understanding of the company, is further evidenced by the fact that the amount of each premium to be paid, as shown upon the face of the policy, is $21 that amount being entered under the words "Annual Premium" which are placed
41 on the side of the first page of the policy, in a position to catch the eye, being so placed doubtless so that any one interested will see at a glance the amount of the premium and the period of payment.

If the contention of the defendant to the effect that under the contract of the parties it could rightfully demand payment of the second premium before the expiration of a year from the date of the policies, is sustained, it follows that the contract will be forfeited, whereas the recognized rule required a construction that will sustain the contract if that be possible. The purpose McMaster had in view in entering into the contract was to secure indemnity in the sum of $5000 to his estate in case of his death and to secure this indemnity, he agreed to pay to the company the yearly sum of $21 on each policy. The purpose of the Insurance Company in entering into the contract was to obtain the benefit of the yearly premiums called for by the con-

tract, and to induce the payment thereof the company agreed to indemnify the estate of McMaster upon his death in the sum of $5000 and to secure the payment of the yearly premiums, it was further provided that under certain conditions the contract might be forfeited for non-payment of an overdue premium.

If the contract of insurance be now held valid, the purpose of McMaster in entering into the same will be [forfeited], as his estate will thus receive the indemnity he paid his money to secure. So also the purpose of the Insurance Company will be fulfilled in that it will be entitled to retain the premiums already paid, and to be paid any other premium that had become due before the death of McMaster.

If, however, the contracts of insurance are held to be invalid, and non-enforceable, then the purpose of McMaster in entering into the same will be wholly defeated and the Insurance Company will be allowed to avoid its promise to pay the amount of the policies on the death of the assured, while it is permitted to retain the sums paid it to secure indemnity. In effect the contention of the defendant company now is that the contract of insurance must be construed in favor; that it should be so construed as to defeat the purpose for which it was made and to declare it forfeited rather than to sustain it and finally in construing its provisions the construction already put thereon by the parties must be disregarded. The pivotal point in the case is, whether the contract of insurance provides on its face that the premiums were to be paid annually. If it does, this means that the second premium cannot be demanded and does not become due and payable until a full year has elapsed after the date of the policy. Taking into consideration the fact that the company required McMaster to designate on the face of the application whether the premiums were to be paid quarterly, semi-annually or annually; that McMaster declared his choice to be for annual payments and so stated on the face of the application; that the company accepted the application as thus made and issued policies which in terms made the application part of the contract; that the form of the policies issued by the company is that used when the premiums are to be paid annually; that the amounts of the several premiums to be paid were by the company calculated on the basis of annual payments and the amount thereof was stated on the side of the policies under the heading, "Annual Premium" that when the company
42 delivered the policies it demanded from McMaster and he paid one year's premium in full, can there be any possible doubt that the parties understood that the contracts of insurance entered into between them provided for annual payment of the premiums. Can there be any doubt that when Mc-

Master received the policies dated December 18th, 1893, and paid one year's premium thereon, he was justified in assuming that if he died within one year from the date of the policies, his estate would receive the indemnity which it was his purpose to secure even though the policies did not contain the provision giving one month's grace on subsequent payments.

Suppose McMaster had died on the 1st day of December, 1894, less than one year from the date of the policies, would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1st, 1894? That is exactly the claim now made by the defendant company. If the company after accepting a proposition to insure McMaster on the basis of annual premiums, can make the second premium payable in six days less than a full year, which is its claim in the present case, it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semi-annually. In such case, it would appear that the contract of insurance contains inconsistent and contradictory provisions and in that event the settled rules of construction require that force shall be given to the provisions which will sustain the contract, rather than to those which would work a forfeiture thereof.

I repeat the assumed case, already stated: suppose these policies did not contain the provision with respect to the so-called month of grace in the payment of subsequent premiums, but did contain a provision that if the premiums were not paid on the day they came due, the policies were forfeited. Suppose the contracts of insurance had been entered into in the mode proven in this case and the policies in the present form, except as to the forfeiture clause, had been issued dated December 18, 1893, and had been delivered upon the payment by McMaster, of one full year's premium thereon, and that McMaster had died on the 15th of December, 1894, that is, in less than a year from the date of the policies.

Would it be open to the defendant company to claim a forfeiture of the contracts under such circumstances? Could the company be permitted to say, it is true we required McMaster to designate the kind of policy we were to issue and he selected policies to be based upon annual payment of the premiums, and so stated in the application? It is true we issued policies of the form used for annual payments. It is true we calculated the premiums on the basis of annual payments and stated the amount on the face of the policies. It is true when we delivered the policies we demanded and McMaster paid us one full year's premium in full. It is true McMaster died in less than one year

from the date of the policies but his estate cannot recover the indemnity he had paid for because we put into the policy a provision making the second premium due and payable on the 12th day of December and as McMaster had not paid this second premium, his estate cannot recover, even though it be true that he died in less than a year from the date of the policy. Would a court be justified in holding that a forfeiture of the contract had happened under such circumstances? Would not
43 the answer be that the application which forms part of the contract between the parties expressly provided that the premiums were to be payable annually and the act of the company in so wording another part of the contract as to require the second premium to be paid in a less period simply resulted in putting contradictory provisions in the contract, in which event the construction must be most favorable to the assured, and in favor of sustaining the policy. But it is said that in this supposed case the party assured died during the year for which the premium had been paid and that while a court would not permit a forfeiture during that period, because in fact the premium for that period had been paid, yet a different rule would prevail, if the party died after the year for which the premium was paid had elapsed, but during the so-called month of grace. If policies of life insurance were like fire insurance contracts, where the risk assumed by the company terminates at a date fixed in the contract, there might be some force in the argument, but such is not the case, and the analogy suggested is misleading. In fire insurance contracts the risk is assumed for a fixed period, and the premium demanded and paid only keeps the contract in force for a named and known period.

When that period elapses, the contract is at an end, unless new life is given it by a renewal for another fixed period, and in such cases the payment of a year's premium only entitles the insured to protection against loss for that period. In cases of life insurance under policies such as are sued on in this case, the contract of insurance when once it takes effect by payment of the first year's premium and delivery of the policies does not terminate at the end of the year, but it is a contract for the life of the assured. In other words when the company in this case issued these policies under date of December 18, 1893, received payment of the first premiums thereon and delivered the policies to McMaster the company agreed on its part to pay the amounts called for in the policies to the estate of McMaster, upon his death whenever the event might occur. If the policies contained no provision for the forfeiture thereof, no further payment on the part of McMaster would have been needed to keep the policies in full force. All the company could demand

in such case would be the right to set off against the amount of indemnity it had bound itself to pay, the amount of the premiums remaining unpaid with interest thereon.

The fact being proven that the first premiums on the policies were in fact paid to the company and that the policies were delivered to McMaster, it follows that from the time of the delivery of the policies McMaster had contracts which bound the company to pay to his estate the sum of five thousand dollars on his death.

By their terms the policies of insurance as contracts extend, not from year to year, but from their date, December 18, 1893, until the death of McMaster, whenever that might occur. The payment of the first premium and the delivery of the policies put them into effect for this period and not solely for one year subject to the right of forfeiture secured to the company.

Therefore when McMaster died on the 18th of January, 1895, the company was bound to pay to his estate the amount called for by the policies, unless the same had become forfeited under some provision thereof securing the right of forfeiture to the company. The provisions of the policies, already quoted, in full do not declare that the same shall be forfeited if a " premium comes due and is not then paid, but it is declared that during one month after a premium becomes due, the company will deem the unpaid premium to be an indebtedness due the company running at interest, and that if the assured dies during this month of grace, the amount of the unpaid premium with interest will be deducted from the sum due on the policy. Under this clause of the policy, to entitle the company to declare the contract forfeited, it must appear that a premium has become due and demandable; that a full month has elapsed since the premiums became thus due and that during this month the amount of the premium with interest has not been paid and that the assured is still living. If during the socalled month of grace, the premium is paid with interest or if the party insured dies, the right of forfeiture does not accrue and the policies remain in full force. The socalled month of grace does not begin to run until a premium becomes due and demandable from the person insured and thus we come back to the question when did McMaster become bound to pay the second premium on the policies sued on. If the payments of the second premiums could not be properly demanded of him until the expiration of one year from the date of the policies, then the second payment did not become due until December 18th, 1894, the month of grace would not begin to run until that payment became due and being a calendar month, it would extend to and would include the 18th day of January, 1895, on the morning of which day McMaster died.

Therefore it is that the company claims that the second premium became due and payable on December 12, 1894. If the contract between the parties, when considered in all its clauses and provisions, shows that it was agreed and understood between the parties that the second premium was to become due and payable on December 12th, 1894, then it is clear that when McMaster died the policies had become forfeited and of course no recovery thereon can be had.

If, however, the contract shows that McMaster contracted with the company on the basis of payments to be made annually and the company dealt with him on that basis, but to serve the interests of its own agent, it without consulting McMaster or calling his attention thereto, introduced a provision into the policy which makes the second premiums payable in less than a year and it thus appears that in the same contract there are to be found inconsistent and contradictory statements and provisions then under the settled rules of construction the Court should give force to those provisions which will prevent a forfeiture, which will sustain the contract and will be most favorable to the assured, disregarding those which would lead to the contrary results.

But it is said the company was justified in what it did with respect to making the second premium due and payable in less than a year, by reason of the statement written into the face of the application, asking that the policy be dated the same as the application and that it is not open, in an action of law, to show that these words were not in the application when the same was signed by McMaster, but had been written in the application, after it had been signed by the agent of the company, and therefore these words must be taken to be the act of McMaster upon which the company had a right to rely.

The provisions of section 1750 code of Iowa were in
45 force in 1893 when these contracts of insurance were entered into, and this statute makes the act of a solicitor or other agent acting for the company, the act of the company and not the act of the applicant for insurance. In the case of the Continental Ins. Co. vs. Chamberlain, 132 U. S. 304, this statute was construed by the Supreme Court with respect to a life policy issued by a foreign company in Iowa, it being held that "this statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy either expressly or by necessary implication made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any

act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured.

If it could, then the object of the statute would be defeated. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company."

The case just cited was an action at law based upon a life insurance policy, issued on the life of Richland Stevens. The defendant company pleaded that in the application signed by Stevens, there was a misstatement of a material fact, in that it was therein stated that Stevens had no other insurance on his life, whereas in fact he had, when the application was signed, a large amount of insurance in co-operative companies. On the trial before the jury, the Court permitted the plaintiff to show by oral testimony that the answer to the question about other insurance was written into the application by the agent of the insurance company, after he had been informed by the applicant that he held this co-operative insurance. The Supreme Court affirmed the action of the trial Court, holding that under the statute of Iowa, it was open to the plaintiff to prove by whom the statement in the application had, in fact, been written, and that it appearing from the evidence that the statement was written by the soliciting agent of the company, it must be held in law to be the act of the company, and being its act, and not that of the assured, it could not be relied on to defeat a recovery on the policy, even though it appeared that it was so written into the application before Stevens signed the same. Under the ruling of the Supreme Court in the case just cited, it must be held that it is open to the plaintiff to show that the words, "Please date policy same as application", were written into the application not by McMaster, but by the agent of the company, and that they were so written after the application had been signed by McMaster, and without his knowledge or assent. As the proof is clear that these words were thus written into the application by the agent of the company and without the knowledge of McMaster, it is settled that the placing them in the application was, in law, the act of the company, and not that of McMaster, and the company cannot rely on its own act, done without the knowledge or assent of the assured, as a ground for estopping the assured or his representative from claiming that under the contract of insurance the premiums were to be paid annually.

But, furthermore, the company did not, in fact, comply with the clause thus written into the application.

46 That requested that the policies should bear the same date as the application, which was December 12, 1893. The policies, when issued, were dated December 18th, 1893, and thus the company refused to comply with the request written into the application. Having refused the request as made, upon what theory can it be said that it made the second premium payable on December 12, 1894, at the request of the assured. Neither on the face of the application nor in any other way was such a request made by McMaster or by anyone else. The company, by its own act, not requested or authorized by McMaster, chose to write into the policy the provision making the second premium come due at a time less than one year after the date of the policy, and there exists no ground for the claim that McMaster was bound by this act of the company by way of estoppel or otherwise.

But it is contended on behalf of the defendant that when the policies were delivered to McMaster they contained the provision making the second premium due and payable on December 12, 1894, and by accepting them with this provision, he indicated his consent to this change in the time of payment. If the evidence proved that the company called McMaster's attention to this provision of the policies and that he assented thereto, there would be foundation for the claim made, but the evidence proves that his attention was not called to the provision and that he accepted the policies and made payment therefor without reading the same, in reliance upon the statement of the agent of the company that the policies were [—] exact accordance with the terms previously agreed upon. There is nothing, therefore, in the facts proven, from which it can be inferred that McMaster ever knowingly assented to the provision now found in the policies, whereby the second payment of the premium was made payable at a date less than one year from the date of the policies.

But it is said that even though he did not read the policies, he had the opportunity so to do and, therefore, that it must be held that he agreed to accept and be bound by the contracts in the form in which they were delivered and accepted.

Granted. What do the contracts, properly construed, require with respect to the payment of the second premiums? Turning to that part of the contract set forth in the application there is the statement in plain words, "Premiums payable annually". The policies are dated December 18, 1893, and the first premiums were paid on December 26th, but under the custom of insurance companies it is considered the same as though

paid on the 18th, the date of the policies, certainly under this clause of the contract, the second payments could not become due or be claimed until the lapse of one year from December 18, 1893.

Turning to another clause of the contract we find a provision, making the second premium due and payable in less than one year from the date of the policies. Are these provisions consistent or are they inconsistent and contradictory? If inconsistent and contradictory, then it is the settled law that force shall be given to the provision that maintains the life of the contract, and that protects the assured rather than the company, through whose fault these inconsistent and contradictory provisions have been introduced into the contracts. Admitting, therefore, that McMaster is to be bound by the contracts in the form in which they were delivered, he can only be held bound by the legal construction thereof as a whole, and thus we come back in every instance to the crucial
47 question, do these contracts contain contradictory provisions with respect to the time when the second premium could be rightfully demanded from McMaster. Upon that question depends the result in this case.

But it is further contended that there is some evidence tending to show that McMaster did not intend to make a second payment of premiums on these policies and, therefore, his representative ought not to recover thereon, as McMaster died after the year for which he had paid the premiums had expired.

If policies of life insurance were like fire insurance policies, in that they terminate at a fixed date, there might be some force in this argument, but as already stated, and is expressly ruled in Insurance C. vs. Statham, 93 U. S., 24, and Thompson vs. Insurance Co., 104 U. S., 252, cases already cited, contracts of life insurance such as those sued on are good for the lifetime of the assured. Therefore, when McMaster died these policies were in force, unless they had become forfeited under the provisions of the policy. There is nothing in the evidence which tends to show that McMaster intended to waive any benefit or protection these contracts would give him, or to yield up any right which his estate might lawfully assert thereunder in the event of his death.

There is some evidence tending to show that McMaster contemplated taking a policy in another company in lieu of part of his insurance in the defendant company, but this purpose had not progressed so far that he had released the defendant company from its liability on the policies sued on, nor can it be known if McMaster had lived, whether in fact he would have finally forfeited any part of this insurance or not. Dur-

ing his lifetime he had done no act which released the company from its obligations, and therefore the company is bound to the payment of the sums called for by these policies, unless it be held that the same, when McMaster died, had become forfeited for non-payment of the second premium due on the policies, and which forfeiture could not be claimed unless it be true that a full calendar month had elapsed between the date when these premiums could be lawfully demanded and the date of McMaster's death. To sustain the plea of forfeiture, it must be held that the parties had contracted and agreed that the second premium should come due in a period less than one year from the date of the policies. If there is doubt on this question, if the contracts between the parties contain contradictory provisions on this point, then the Court is required to look at and give due weight to the acts of the parties with reference to the contracts, and to apply the rule that forfeitures are not favored, and that the construction must be against the party who prepared the contract. Can there be any doubt, under the evidence in this case, that the parties understood and agreed that the insurance furnished to McMaster was to be based upon the payment of premiums annually? Can there be any doubt that the company calculated the amount of the premiums on the basis of annual payments? Can there be any doubt that McMaster paid the sums demanded of him and received the policies upon the understanding that the subsequent premiums were to come due annually and not at some shorter period? In short, can there be any doubt that both parties dealt with each other upon the express agreement that the first premium was to be paid down when the policies were delivered, and the second premium was to
48 come due in one year? Can there be any doubt that upon the face of the application, which is an essential part of the contract between the parties, it is written that the premiums are to be payable annually? The policies are dated December 18th, 1893, and did not take effect actually or constructively, before that date. The premiums, being payable annually, are to be paid then, the first as of the date of policies, and the subsequent premiums annually thereafter. But the company now claims that by its own act, it placed in the contracts a clause which enables it to demand the payment of the second premiums in less than one year from the date of the policies. Thus, the company, by its own act, and without the actual knowledge or assent of McMaster, has made these contracts of insurance self-contradictory; and, this being so, then the construction ought to be against the company, against the forfeiture and in favor of that construction which carries out the real agreement and understanding which the evidence demonstrates existed between the parties to these contracts.

If free to give judgment according to my own view of the questions involved, I should find for the plaintiff, but, as already stated, the Circuit Court of Appeals held in the equity case that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant.

Indorsed: No. 217 Law. Filed November 7, 1898. A. J. Van Duzee, Clerk.

49 And on the 7th day of November, 1898, the following proceedings were had by said Court in said cause, and entered of record on page 470 of Record No. 2 of said Court, to wit:

Fred A. McMaster, Administrator, etc.,
No. 217. vs. Law.
New York Life Insurance Company.

The above entitled cause having been heretofore, to wit, October 5th, A. D. 1898, at the regular October term of this Court, duly tried and argued and submitted to the Court, the parties hereto having duly signed and filed written stipulation waiving a jury and consenting to try the cause to the Court and the Court being now on this 7th day of November, A. D. 1898, fully advised in the premises, finds and so orders that the motions to strike be overruled, the Court also finds the facts established by the evidence to be as follows, to wit:

1st. The plaintiff, Fred A. McMaster,[—] when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa; and furthemore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa and a resident of Woodbury County, Iowa.

2nd. That the defendant, the New York Life Insurance Company, [—] when this suit was brought and is now, a corporation created under the laws of the State of New York, having its principal place of business and office in the City of New York, in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company

and set forth in circulars issued by the company, and printed on the back of the policies issued by the company under the heading, "Benefits and Provisions referred to in this Policy" in the following words, "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premiums with interest as above, remains an indebtedness due the company, and in the event of the death during the said month, this indebtedness will be deducted from the amount of the insurance."

50 4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "Please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be

paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five polices each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital, "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .. cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

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The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment

thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as she understood it, the grace on the second premiums would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

12th. That in November or December, 1894 Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company; it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received and in reply McMaster said, "All rght, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

52 15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff,

as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

Accordingly, upon the above finding of facts, now on this 7th day of November, A. D. 1898, judgment is hereby rendered in favor of defendant, and that defendant have and recover of and from the plaintiff the costs of this suit taxed at $.....

to all of which plaintiff at the time duly excepted.

53 And afterwards to wit, on the 14th day of December, 1898, there was filed in the office of the clerk of said court in said cause a bill of exceptions, which is in the words and figures following, to wit:

In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs. Law.
New York Life Insurance Company, Defendant.

BILL OF EXCEPTIONS.

Be it remembered, that by written stipulation duly signed and filed herein, the parties to this action waived a jury trial and consented to try the case before the Court, and the evidence having been fully submitted the Court on the 7th day of November, 1898, duly signed and filed herein findings of fact established by the evidence to be as follows:

1st. The plaintiff, Fred A. McMaster, was when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury county, Iowa, and furthermore said plaintiff was, when this suit was brought, and is now a citizen of the State of Iowa and a resident of Woodbury county, Iowa.

2nd. That the defendant, The New York Life Insurance Company was when this suit was brought and is now, a corporation created under the laws of the State of New York, hav-

ing its principal office and place of business in the city of New York, in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster, to insure his life in that company and as an inducement to taking the insurance pressed upon McMaster, the provision adopted by the company and set forth in the circular issued by the company and printed on the back of the policy issued by the company under the heading, "Benefits and Provisions referred to in this Policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premiums remain due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of the death during the said month this indebtedness will be deducted from the amount of the insurance."

4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual [annual] premium, the said Frank
54 E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1000 each, on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application interlined in ink the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster and were so written in by the agent in order to secure to the agent a bonus which the company allowed the agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster

ever knew that those words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith the agent of the New York Life Insurance Company, and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issue five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof, that the annual premium on each policy was $21.00 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case which is hereby made a part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ..... cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented and if they would insure him for the period of thirteen months, to which the agent replied, that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinabove set
55 forth.,

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster, of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster, for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11th and McMaster said, if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received and in reply McMaster said: "All right, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same

been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company and the same had not been delivered or become effectual.

17th. That due and sufficient notice and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the poli-
56 cies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon November 1, 1898, the sum of ($5,965) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

And accordingly upon said findings of fact, as a proposition of law, the plaintiff Fred A. McMaster, administrator, then and there claimed that upon said findings of fact the law required judgment in favor of said plaintiff and against said defendant for the amount due upon said policies, which claim was by said Court denied, to which denial said plaintiff then and there duly objected and excepted, whereupon said Court then and there based solely and wholly upon said findings of fact, entered judgment in favor of said defendant and against said plaintiff, to which said plaintiff there and then duly excepted and objected claiming that upon said facts so by the Court found, the judgment should be entered in favor of the plaintiff and against the defendant for the amount due upon said policies in petition described, and now herewith said plaintiff presents his bill of exceptions, and asks that the said findings of fact be made a part of the record herein, together with all the pleadings and stipulations of the parties hereto filed herein, and the decree of the Court herein, all of which is now at and during the same term of court at which said judgment was rendered, and in open court, duly done accordingly, and this bill of exceptions being found correct is hereby signed, sealed and made a part of the record in this cause this 14th day of December, 1898.

O. P. SHIRAS, Judge.

Indorsed: No. 217, law. In Circuit Court of United States for Northern District of Iowa, Western Division, October term, 1898. Fred A. McMaster, administrator, plaintiff, vs. New

York Life Insurance Company, defendant. Bill of exceptions. Filed December 14th, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

57 And afterwards, to wit, on the 17th day of December, 1898, at 9 o'clock A. M. of said day, there was filed in the office of the Clerk of said Court, in said cause, the following papers viz: Assignment of Errors, Petition for Writ of Error, Bond on Writ of Error, and Writ of Error, which are in the words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

ASSIGNMENT OF ERRORS.

Comes now Fred A. McMaster, administrator, plaintiff herein, and says that the judgment in said cause is erroneous and against the just rights of this plaintiff, and that there is manifest error therein for the following reasons.

1. Because the Court erred in denying plaintiff's claim for judgment upon the findings of fact.
2. Because the Court erred in rendering judgment for the defendant upon the findings of fact.
3. Because the Court erred in not holding as a proposition of law, that under said findings of fact said plaintiff was entitled to judgment for the amount due upon said policies of insurance.
4. Because the Court erred in not entering upon said findings of fact a judgment in favor of the plaintiff and against the defendant.

Wherefore, this appellant prays that the said judgment be reversed, and a judgment be entered herein, or that said Court be ordered to enter a judgment in favor of the plaintiff and against the defendant, the New York Life Insurance Company, in the sum of $5965, with interest thereon according to law, from November 1, 1898.

HENRY J. TAYLOR,
F. E. GILL,
Attorneys for Plaintiff.

Indorsed: In Circuit Court of United States for Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Assignment of Errors. Filed December 17, 1898, at 9 o'clock, A. M. A. J. Van Duzee, Clerk.

58 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable, the Circuit Court of the United States for the Northern District of Iowa, Western Division:

Your petitioner, Fred A. McMaster, administrator, would respectfully represent and show that in the above entitled cause pending in the United States Circuit Court in and for the Northern District of Iowa, Western Division, there was entered at the present October Term, 1898, under date November 7, 1898, in said Court, a final judgment, greatly to the injury of your petitioner, and which said judgment is erroneous and inequitable in many respects, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, dated this 15th day of December, 1898.

HENRY J. TAYLOR,
F. E. GILL,
Attorneys for Petitioner.

The foregoing claim of writ of error is allowed in open Court, and at the same term at which said judgment was rendered, now on this 17th day of December, 1898. Appeal bond fixed at $300. O. P. SHIRAS, District Judge.

Indorsed: In the Circuit Court of United States for Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Petition for Writ of Error. Filed December 17th, 1898, at 9 o'clock. A. J. Van Duzee, Clerk.

59 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company.

BOND ON WRIT OF ERROR.

Know all men by these presents, that we, Fred A. McMaster, Administrator, as principal, and F. E. Gill and H. J. Taylor, as sureties, are held and firmly bound unto the New York Life Insurance Company, in the full and just sum of three hundred dollars ($300.00), to be paid to said New York Life Insurance Company, to which payment well and truly to be made, we bind ourselves, our heirs, executors, jointly and severally by these presents. Sealed with our seals, and dated this 15th day of December, in the year of our Lord eighteen hundred and ninety-eight.

Whereas, lately at the present October Term, 1898, of the Circuit Court of the United States for the Northern District of Iowa, Western Division, in a suit depending in said Court between said Fred A. McMaster, administrator, plaintiff, and said New York Life Insurance Company, defendant, judgment was rendered for the said defendant, and the said plaintiff has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said Fred A. McMaster, administrator, shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

FRED A. McMASTER, Admr. [Seal]
F. E. GILL. [Seal]
H. J. TAYLOR. [Seal]

Sealed and delivered in the presence of

State of Iowa,
Woodbury County—ss.

F. E. Gill and H. J. Taylor, sureties on the within and foregoing bond, being duly sworn, each for himself, severally, deposes and says that he is worth, after paying his just debts,

more than three hundred dollars, exclusive of property exempt from execution of the laws of the state in which he resides.

F. E. GILL, H. J. TAYLOR.

Subscribed and sworn to before me by the above named F. E. Gill and H. J. Taylor, this 15th day of December, 1898.

60

[Seal] ZENIA M. REEVE,

Notary Public within and for Woodbury County, State of Iowa.

The above bond is approved this 17th day of December, 1898.

O. P. SHIRAS, District Judge.

Indorsed: In Circuit Court of United States for Northern District of Iowa, Western Division, October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Bond on Writ of Error. Filed December 17, 1898, at 9 o'clock a. m. A. J. Van Duzee, Clerk.

61 And on the said 17th day of December, 1898, there was filed in the office of the Clerk of said Court in said cause, "Instructions to Clerk as to what shall compose the transcript on writ of error to C. C. of Appeals" which is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,

vs.

New York Life Insurance Company, Defendant.

The Clerk is hereby directed to put in the transcript for writ of error to the United States Circuit Court of Appeals, for the Eighth Circuit, the following:

1. Entire transcript from State Court filed herein, October 4, 1895.
2. Amended and substituted answer filed October 4, 1895.
3. Reply filed October 5, 1895.
4. Amendment to substituted answer, filed April 24, 1896.
5. Reply to amended and substituted answer and amendment to substituted answer filed April 25, 1896.
6. Amendment to amended and substituted answer filed December 12, 1896.
7. Amendment to petition filed April 5, 1897.
8. Amendment to petition filed September 27, 1898.
9. Amendment to reply filed September 27, 1898.
10. Answer to amendment filed October 5, 1898.

11. Waiver of jury, filed October 5, 1898.
12. Findings of fact signed and filed herein November 7, 1898, which includes the opinion of the Circuit Court.
13. Judgment.
14. Bill of Exceptions.
15. Assignment of Errors.
16. Petition for Writ of Error.
17. Bond on Writ of Error.
18. Citation.
19. Writ of Error.

F. E. GILL,
HENRY J. TAYLOR,
Attorneys for Plaintiff.

Indorsed: In the Circuit Court of United States for Northern District of Iowa, Western Division. Fred A. McMaster, administrator, plaintiff, vs. New York Life Insurance Company, defendant. Instructions to Clerk as to what shall compose the transcript on writ of error to C. C. of Appeals. Filed Dec. 17, 1898. A. J. Van Duzee.

62 In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

WRIT OF ERROR.

United States of America—ss.

The President of the United States to the Honorable the Judge of the Circuit Court of the United States, for the Northern District of Iowa, Western Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the October Term, 1898, thereof, between Fred A. McMaster, administrator, plaintiff, and the New York Life Insurance Company, defendant, a manifest error hath happened, to the great damages of the said Fred A. McMaster, administrator, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth

Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United
63 States Circuit Court of Appeals, for the Eighth Circuit, on or before sixty days from the signing and date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of December, in the year of our Lord, one thousand eight hundred and ninety-eight. Issued at office in the City of Sioux City, with the seal of the Circuit Court of [—] United States for the Northern District of Iowa, Western Division, dated as aforesaid.

Circuit Court
U. S.
Northern District
of Iowa.
Sioux City.

A. J. VAN DUZEE,
Clerk of Circuit Court of United States, Northern District of Iowa, Western Division.

Allowed by O. P. SHIRAS, Judge.

64 In Circuit Court of United States, for Northern District of Iowa, Western Division, October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Writ of Error. Filed December 17, 1898, 9 o'c. a. m. A. J. Van Duzee, Clerk.

65 United States of America,
Northern District of Iowa—ss.

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, do hereby certify and return that the writ of error which is hereto attached was filed in my office at Dubuque on the 17th day of December, A. D. 1898, and a copy thereof at the same time lodged in my office, and I now return said writ of error, and annexed thereto and hereto attached, an authenticated copy of so much of the

record as is covered by the instructions of the parties, in writing hereto attached, in the case mentioned in said writ of error, and the citation and proof of service thereof.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Dubuque in said District the 26th day of December, A. D. 1898.

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa.

[Cancelled 10c U. S. Rev. Stamp.]

66 In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

CITATION.

The United States of America,
To the New York Life Insurance Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of Iowa, Western Division, wherein Fred A. McMaster, administrator, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered for the said defendant in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Oliver P. Shiras, judge of the Circuit Court of the United States, for the Northern District of Iowa, Western Division, this 17 day of December, in the year of our Lord, eighteen hundred and ninety-eight.

O. P. SHIRAS, Judge.

67 Personal service of the above citation is hereby admitted on this 23 day of December, 1898.

W. E. ODELL,
SWAN, LAWRENCE & SWAN,
Attorneys for defendant in error.

68 In the Circuit Court of United States, Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Co., Defendant. Citation. Filed December 26, 1898. A. J. Van Duzee, Clerk.

69 United States of America,
Northern District of Iowa—ss.

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, do hereby certify that the foregoing is a full, true and perfect transcript of so much of the record and proceedings in the case of "Fred A. McMaster, administrator of estate of Frank E. McMaster, deceased, plaintiff, vs. The New York Life Insurance Company, Defendant," No. 217, Law, as is included in the direction of the parties herewith attached, as fully as the same remain on file and of record in my office.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Dubuque, in said District, this 26th day of December, 1898.

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa.

[Cancelled 10c U. S. Rev. Stamp.]

Filed Jan. 3, 1899. John D. Jordan, Clerk.

69 Appearance for Plaintiff in Error.

And on the third day of January, A. D. 1899, an appearance of counsel for Plaintiff in Error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

Fred A. McMaster, Administrator, Appellant,
vs.
New York Life Insurance Company, Appellee.
Precipe for Appearance.

The Clerk will enter our appearance as counsel for appellant.
HENRY J. TAYLOR,
FRANK E. GILL.

Indorsed: No. 1202. Fred A. McMaster, Admr., etc., Plaintiff in Error, vs. New York Life Ins. Co. Appearance. Filed Jan. 3, 1899. John D. Jordan, Clerk. Henry J. Taylor, Frank E. Gill, Sioux City, Iowa, Counsel for Plff. in Error.

Appearance for Defendant in Error.

And on the first day of April, A. D. 1899, an appearance of counsel for Defendant in Error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 1202, December Term, 1898.

Fred A. McMaster, Administrator, etc., Plaintiff in Error,
vs.
New York Life Insurance Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

W. E. ODELL.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1898. No. 1202. Fred A. McMaster, Administrator, etc., Plaintiff in Error, vs. New York Life Insurance Company. Appearance. Filed Apr. 1, 1899. John D. Jordan, Clerk. W. E. Odell, Counsel for Deft. in Error.

Order of Submission.

And on the sixteenth day of May, A. D. 1899, in the record of the proceedings of said United States Circuit Court of Appeals is an order of submission in said cause in the words and figures following, to wit:

70 United States Circuit Court of Appeals, Eighth Circuit.
May Term, 1899. Tuesday, May 16, 1899.

Fred A. McMaster, Administrator, etc., Plaintiff in Error,
No. 1202. vs.
New York Life Insurance Company.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This cause having been called for hearing in its regular order, the motion of defendant in error to dismiss the writ of error was argued by Mr. W. E. Odell in support thereof and submitted to the Court.

On consideration whereof, it is now here ordered that said motion to dismiss be and the same is hereby denied.

Thereupon, this cause came on for hearing upon the merits and was argued by Mr. W. E. Odell for the defendant in error and submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

Opinions.

And on the eleventh day of December, A. D. 1899, the opinions of said United States Circuit Court of Appeals were filed in said cause in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 1202.—DECEMBER TERM, A. D. 1899.

Fred. A. McMaster, Administrator of the Estate of F. E. McMaster, deceased,
Plaintiff in Error,
vs.
The New York Life Insurance Company,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Mr. Henry J. Taylor and Mr. F. E. Gill submitted a brief for plaintiff in error.
Mr. W. E. Odell submitted a brief for defendant in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

This was an action brought by the plaintiff in error, Fred. A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the defendant in error, the New York Life Insurance Company, upon five policies of insurance of one thousand dollars each upon the life of Frank E. McMaster. The defense was that the insurance had ceased before he died on January 18, 1895, because he had failed to pay the annual premiums due on December 12, 1894. The policies were dated on December 18, 1893, and contained these provisions:

"This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. * * * If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided)

this policy shall become void, and all payments previously made shall remain the property of the company. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid." The applications for these policies were in writing and were dated on December 12, 1893, and contained this agreement: "I do hereby agree as follows: * * * 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office in this application." After the applicant had signed the applications the agent who solicited them wrote into each of them, without the knowledge of the applicant, "Please date the policy same as application," and copies of the applications containing this interlineation were attached to the policies which were delivered to the insured on December 26, 1893, when he paid his first annual premiums. He died on January 18, 1895, and the only question in the case was whether or not the second annual premiums which he never paid became due before December 18, 1894. The court below tried the case without a jury, made special findings of the facts and dismissed the action. The findings of facts so far as they are material to the question at issue were as follows:

"3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading 'Benefits and provisions referred to in this policy,' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

"5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

"6th. There now appears on the face of the application, interlined in ink, the words 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

"7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

"8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1,000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are

hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.'

"9th. The five policies enclosed in envelopes on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

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"11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as she understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

"12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company at the expiration of his insurance in the defendant company, but also to continue part of the policies in the defendant company.

"13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City told him the policies issued by the Union Central Company had been received and in reply McMaster said, 'All right, just hold them, there is no hurry about them,' and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

"14th. That the action of Frank E. McMaster shows and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part."

The only error assigned is that upon these facts the judgment should have been for the plaintiff.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves. The argument of the counsel for the plaintiff in error when reduced to its last analysis is that because in the parol negotiations which preceded the delivery of the policies in suit the agent of the insurance company informed the deceased that his policies would insure his life for thirteen months without the payment of the second annual premiums and because when he delivered the policies to him he told him that they did so insure him, therefore this preliminary information and this contemporaneous statement must supersede the written contracts, which expressly provide that the policies shall cease to be binding if the second premiums are not paid by January 12, 1895, twelve months and seventeen days after the policies were delivered. This proposition as it affects the policies in this case was considered and our decision concerning it was rendered in a suit in equity to reform these policies, which is reported under the title *New York Life Ins. Co.* v. *McMaster*, 57 U. S. App. 638, 30 C. C. A. 532, 87 Fed. Rep. 63, and the Circuit Court of Appeals for the Sixth Circuit has since rendered a like decision upon a similar state of facts in *McConnell* v. *Provident Savings Life Assurance Society*, 92 Fed. Rep. 769. The views expressed in our opinion in the former suit undoubtedly met the approval of the Supreme Court for it denied an application to issue a writ of certiorari to review our decision. 171 U. S. 687.

Our conclusion in the suit in equity was that upon the facts there presented the plaintiff could not recover upon these policies either at law or in equity. The facts which the court below has found in this case do not vary from those presented in the former suit so materially as to warrant a different conclusion here. The only notable difference is that it appears in this case, as it did not in that, that at the time the policies were delivered, the insured "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth," and that he believed that the policies would continue in force until thirteen months from their date (which was December 18, 1893) although they plainly stated that the second annual premiums would be due on December 12, 1894; that there was only one month's grace thereafter; that the policies would cease to insure his life if those premiums were not paid within that time, and although on December 11 or December 12, 1894, the collector of the company called on the deceased for these premiums, he declined to pay them and said he did not think he would renew the insurance and she told him that he was entitled to one month's grace and that as she understood it the grace on the second premiums would expire on January 11, 1895. It will be borne in mind that the policies provided that the annual premiums should be paid on December 12, that they gave one month's grace, that they were dated on December 18, 1893, that they were delivered and the first premiums were paid on December 26, 1893, and that the insured died on January 18, 1895, six days after the policies had expired according to their terms. It is also worthy of note that the statement made at the time the policies were delivered was not a representation of any words or terms which the contracts contained, but a mere statement of the legal effect of the policies.

The only question which this new fact that this statement was made when the policies were delivered presents is whether oral statements made by one of the parties to a written contract to the other at the time of its delivery respecting its terms and their legal effect, or the written terms themselves, constitute the agreement, and that question has been repeatedly answered by the Supreme Court and by this court. In *Thompson* v. *Insurance Co.*, 104 U. S. 252, 259, the policy provided that it should be void on the non-payment of the note taken for the premium and the Supreme Court held that a plea that a parol agreement was made, at the time of the giving and accepting of the

policy, that the policy should not become void for the non-payment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice Bradley said: "An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. In *Travelers' Ins. Co.* v. *Henderson*, 32 U. S. App. 536, 543, 547, 16 C. C. A. 390, 393, 395, 69 Fed. Rep. 762, 766, 768, the agent of the company told the insured when he delivered the policy that "if anyone killed him while he was going to and from the city the policy would cover him," but the policy expressly excepted "intentional injuries inflicted by the insured or any other person." The insured was shot from ambush and this court held in a suit in equity to reform the policy that the bill must be dismissed and declared the law to be that "where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions." In *Green* v. *Chicago & N. W. Ry. Co.*, 92 Fed. Rep. 873, 877, the plaintiff had signed a final receipt and release of all his claims under a certain contract, before that contract was completed, in reliance upon the statement of the engineer of the railroad company, which was made at the time he signed the release, that it covered nothing but the work already completed. When, however, he sued the company for damages for its refusal to permit him to complete his contract, this court held that the oral statement was incompetent evidence and that the final release had discharged the corporation from all liability. We adhere to the conclusion which we reached upon this question after a review of these and many other authorities in the suit in equity. *New York Life Ins. Co.* v. *McMaster*, 87 Fed. Rep. 63, 69-72, 30 C. C. A. 532, 57 U. S. App, 638. We there said: "This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it. *Laclede Mfg. Co.* v. *Hartford Ins. Co.* 19 U. S. App. 510, 513, 520, 9 C. C. A. 1, 3, 8, and 60 Fed. 351, 353, 358; *Insurance Co.* v. *Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, and 69 Fed. 762, 764, 766; *Thompson* v. *Insurance Co.*, 104 U. S. 252, 259; *Insurance*

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Co. v. *Mowry*, 96 U. S. 544, 547; *Assurance Co.* v. *Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529, 530, 531, 532; *Association* v. *Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank* v. *German Ins. Co.* 18 C. C. A. 203, 71 Fed. 473; *Insurance Co.* v. *Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; *Burt* v. *Bowles*, 69 Ind. 1; *Clodfelter* v. *Hulett*, 72 Ind. 137; *Hudson Canal Co.* v. *Pennsylvania Coal Co.* 8 Wall. 276, 290; *Insurance Co.* v. *Lyman*, 15 Wall. 664; *Pearson* v. *Carson* 69 Mo. 550; *Insurance Co.* v. *Neiberger*, 74 Mo. 167; *Lewis* v. *Insurance Co.*, 39 Conn. 100."

Nor is it any excuse for a party who has an opportunity to read or to know the contents of his agreement, or any ground for an abrogation or modification of it, that he relied upon the statement or interpretation of it given by the other party to the contract and failed to read it. The very purpose of a written agreement is to supersede testimony of its terms and to shut out the uncertainties that arise from the failing memories and changing interests of living witnesses. Under the law the writing is the highest evidence of the subject, the extent and the manner of the contracting. If written agreements may be swept away and disregarded at will by the parties to them upon simple proof that they did not read them and that the other parties to them told them when they were made that they contained terms different, or had legal effects variant from their actual terms and effects, then the functions of written contracts are gone and the salutary rule that they must prevail over prior and contemporaneous verbal negotiations, arrangements and representations, as to their contents and effects, is subverted. The argument that a false statement of the contents or effect of a contract to one who has possession of it and is about to accept or make it, constitutes a fraud which will avoid the written agreement and estop the party who makes the statement from denying its truth, is conclusively answered by the unanimous opinion of the Supreme Court in *Insurance Co.* v. *Mowry*, 96 U. S. 544, 547. That court said: "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention or conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions parties must provide by

stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal agreements and open the door to all the evils which that rule was intended to prevent. *White* v. *Ashton*, 51 N. Y. 280; Bigelow Estoppel, 437-441; *White* v. *Walker*, 34 Ill. 422; *Faxton* v. *Faxon*, 28 Mich. 159." The statement of the terms or effect of a written agreement which one has in his hands and is about to make and which he may read at his will is not calculated to deceive and is not an artifice or a fraud that will excuse his ignorance of its contents because he has the patent means to verify the averment at his command. It is the written contract itself and not any one's statement of its contents or of its effect which binds the parties and the law charges every party to an agreement with knowledge of this fact. In view of it, it is the duty of every man to see to it that every writing he signs or receives fairly and fully expresses his contract. He owes this duty to the other party to the contract who generally acts, and often changes his position in reliance upon it, and he owes it to the public, which, as a matter of policy, treats the writing as proof of the terms of the agreement. If he fails to discharge this duty, if he fails to read his contract, his ignorance of its contents is the result of his own negligence and in the absence of fraud or mutual mistake he is thereby estopped from showing that its terms are other than those expressed by the writing. *Railway Co.* v. *Bellwith*, 55 U. S. App. 113, 119, 28 C. C. A. 358, 361, 83 Fed. Rep. 437, 440; *Green* v. *Chicago & N. W. Ry. Co.* 92 Fed. Rep., 873, 876. Insurance policies do not constitute exceptions to this rule. *Travelers' Ins. Co.* v. *Henderson*, 32 U. S. App., 536, 540, 16 C. C. A. 390, 393, 395, 69 Fed. Rep. 762, 766, 768; *Morrison* v. *Ins. Co.* 69 Tex. 353, 359; *Quinlan* v. *Ins. Co.* 133 N. Y. 356, 365; *Wilcox* v. *Ins. Co.* 85 Wis. 193; *Fuller* v. *Ins. Co.* 36 Wis. 599, 604; *Hubst* v. *Lowe*, 65 Wis. 316; *Hawkins* v. *Ins. Co.*, 70 Wis. 1, 2; *Herndon* v. *Triple Alliance*, 45 Mo. App., 426, 432; *Palmer* v. *Ins. Co.*, 31 Mo. App., 467, 472; *Ins. Co.* v. *Yates*, 28 Grat. 585, 593; *Ryan* v. *Ins. Co.* 41 Conn., 168, 172; *Barrett* v. *Ins. Co.* 7 Cush. 175, 181; *Holmes* v. *Ins. Co.*, 10 Metc. (Mass.), 211, 216; *Ins. Co.* v. *Swank*, 12 Ins. Law J. 625, 627; *Ins. Co.* v. *Hodgkins*, 66 Me., 109, 112; *Ins. Co.* v. *Neiberger*, 74 Mo. 167, 173; Beach on Insurance (1895) section 414 and cases cited. The statement of the legal effect of the policies made by the agent of the insurance company when they were delivered does not abrogate or modify the terms or the meaning of the contracts.

Nor can his prior statement to the same effect, made fourteen days before, when the applications were signed, or his interlineation in the applications of the request to date the policies the same as the applications after McMaster had signed them and without his knowl-

edge have any greater effect. The reasons for this decision are stated in our opinion in the equity suit. The findings in the case at bar make still clearer the conclusion at which we arrived in that case that prior to the delivery and acceptance of the policies there was no contract and no intention to contract to insure McMaster otherwise than by policies made and delivered upon the simultaneous payment of the premiums, for one of the findings of the court below is that when the application was made "it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered."

An ingenious argument for the modification of the policies has been constructed by counsel for the plaintiff in error on the assumption that when the applications were made there was an agreement to insure on the part of the company and a contract to pay the first premiums on the part of the insured. The assumption is unsupported by the facts of the case. The only finding upon the subject is that which we have quoted. But this finding must be read in connection with the application, which was made a part of the findings, and in the light of the custom of life insurance companies to make no contracts to insure except by means of written policies and upon the actual payment of premiums. The application contains this provision: "I do hereby agree as follows: * * * 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to" &c., from which it clearly appears that the delivery of the policies and the payment of the premiums were conditioned first upon the acceptance of the applications by the officers of the company at the home office and the issue of the policies, and second, upon the acceptance of those policies by the applicant when they were written. Moreover, there is no finding that the insurance company ever agreed to issue any policies or to insure the life of McMaster in any way when the applications were signed or at any time before the policies were delivered. There was therefore no consideration for any agreement by McMaster to pay the premiums and no binding contract on his part to do so or on the part of the company to issue any policies or to insure his life until the policies were actually delivered and the first premiums were paid. Prior to that time the company was free to reject the applications, the insured was free to reject the policies and the whole subject and the entire extent of the agreement found by the court is limited to the time when the premiums should be paid and when the insurance should take effect if the company should subsequently conclude to accept the applications and to issue the policies, and if McMaster should decide to accept them when written. This agree-

ment is in accord with the customary course of the conduct of life insurance. The almost universal custom of that business is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid and a policy has been delivered. *Equitable Life Assurance Society* v. *McElroy*, 49 U. S. App. 548, 561, 28 C. C. A. 365, 372, 83 Fed. Rep. 631, 638; *Paine* v. *Pacific Mutual Life Ins. Co.*, 10 U. S. App. 256, 263, 2 C. C. A. 459, 461, 51 Fed. Rep. 689, 691; *Heiman* v. *Phœnix Life Ins. Co.*, 17 Minn. 153, 157; *Markey* v. *Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Hoyt* v. *Mutual Benefit Life Ins. Co.*, 98 Mass. 539, 543; *Markey* v. *Mutual Benefit Life Ins. Co.*, 118 Mass. 178, 194; 1 May on Insurance (3rd Ed.) §56.

There was therefore no contract of insurance until the policies were delivered to and accepted by McMaster. The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a counter-proposition. It took the latter course. It rejected some parts of the applicant's proposition and made a counter-proposition. It proposed by the five policies it sent to the deceased to insure him on the terms written therein. But these policies were nothing but a proposition to insure up to the time when McMaster accepted them and paid the first annual premiums. The proposition which these policies contained was clearly expressed and its meaning was plain. The law, as we have seen, charged McMaster with knowledge of their terms, and when he accepted them estopped him from disputing these terms on the ground that he had not read them, because the policies were placed in his hands and his failure to read them was his own negligence. On December 26, 1893, he accepted the policies and paid the first annual premiums. Then for the first time contracts to insure his life were made and they were that the company would insure it as long as he paid his annual premiums within one month of December 12 in each year. This brief review of the course and effect of the negotiations which preceded the acceptance of the policies shows how baseless is the claim that the statement of the agent when the policies were made and his interlineation of the request to date the policies the same as the application can either contradict or modify the written agreements.

It is true that there is a rule of law that a company may be estopped from defeating a policy when its agent has written into the application of the insured, without his knowledge, a false statement of a material fact which conditions the insurance. *Laclede Mfg. Co.* v. *Hartford Ins. Co.*, 19 U. S. App. 510, 421, 9 C. C. A. 1, 8, 60 Fed. Rep. 351, 358-9; *Mutual Benefit Life Ins. Co.* v. *Robinson*,

19 U. S. App. 266, 7 C. C. A. 444, 58 Fed. Rep. 723; *Ins. Co.* v. *Russell*, 40 U. S. App. 530, 553, 23 C. C. A. 43, 54, 77 Fed. Rep. 94, 106; *Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 225; *Ins. Co.* v. *Mahone*, 21 Wall. 152; *Ins. Co.* v. *Snowden*, 12 U. S. App. 704, 7 C. C. A. 264, 58 Fed. Rep. 342; *Kausal* v. *Association*, 31 Minn. 17, 21, 16 N. W. Rep. 430; *Dietz* v. *Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616. But this rule has no application to the interlineation made by the agent in this case because the request he wrote into the application misstated no fact which conditioned the insurance, but related solely to one of the terms of the contract which was still the subject of negotiation and concerning which each party had every opportunity after the interlineation was made to protect himself when the policies were presented for acceptance. The interlined request was immaterial because it was not complied with by the company and the policies do not rest upon it because it did not relate to a fact which conditioned the insurance, but to a term of the policies which then was, and continued to be the subject of negotiations, and because the company had the right, regardless of the request, to date the policies, which it tendered in its counter-proposition, when, and to write them on such terms as it saw fit and the deceased had an equal right to reject them when they were offered to him. The statement of the agent to McMaster when the applications were signed that the policies would insure him for thirteen months for only one premium, his interlineation of the request in the applications and all the acts and negotiations before the policies were accepted were alike immaterial, because they were merged in the written policies. The amount of the insurance, the amount of the premiums, the times when they should be paid, the time the insurance should continue were all expressed there for the very purpose of avoiding any question respecting them, and the previous negotiations were incompetent to contradict or modify the terms of the policies. "The writing must on familiar principles be held to embody the entire contract obligations of the parties, and all negotiations and colloquies of the parties preceding the execution of the writing were immaterial." *Grand Ave. Hotel Co.* v. *Wharton*, 49 U. S. App. 108, 112, 24 C. C. A. 441, 443, 79 Fed. Rep. 43, 45; *Ins. Co.* v. *Lyman*, 15 Wall. 664, 669; *Ins. Co.* v. *Mowry*, 96 U. S. 544, 547; *New York Life Ins. Co.* v. *McMaster*, 30 C. C. A. 538, 539, 540, 87 Fed. Rep. 63, 69, 71, and cases there cited.

It is earnestly contended, however, that if the previous parol negotiations and the representation of the legal effect of the policies do not modify them, still they are ambiguous and the familiar rules of construction that contracts of doubtful meaning should be construed more strongly against their framers and that the interpretation given them by the parties should prevail, are invoked to extend the life of these policies beyond the limit fixed by their terms. Rules of

construction are valuable aids in the interpretation of ambiguous expressions, inconsistent provisions and terms of doubtful meaning in agreements, but they serve only to befog and mislead the judgment, to defeat the intentions of the parties, to destroy the contracts they actually make and to make those for them to which they never consented when they are applied to agreements whose terms are plain and whose meaning is clear. They aid in the interpretation of ambiguous contracts, but they must not be permitted to abrogate or modify those that are clear and certain. When the language of an agreement is plain it must be held to mean what it expresses and no room is left for construction. *Green* v. *Chicago & N. W. Ry. Co.* 92 Fed. Rep. 873, 880; *Knox County* v. *Morton*, 32 U. S. App. 513, 516, 15 C. C. A. 671, 673, 68 Fed. Rep. 787, 789; *United States* v. *Fisher*, 2 Cranch, 358, 399; *St. Paul, M. & M. Ry. Co.* v. *Phelps*, 138 U. S. 528, 536; *Bedsworth* v. *Bowman*, 104 Mo. 44, 49; *Warren* v. *Barber Asphalt Paving Co.* 115 Mo. 572, 576; *Davenport* v. *City of Hannibal*, 120 Mo. 150. Before we resort to rules of construction let us see if there is any real ambiguity in the expressions or doubt of the meaning of these policies.

It is said that the applications are parts of the contracts, that they declare that the premiums are payable annually, that the first premiums were not paid and the policies did not take effect until December 26, 1893, that consequently the second annual premiums would not be due under the applications until December 26, 1894, and that this conclusion is inconsistent with the provision of the policies that the second premiums should become due on December 12 in each year. The argument seems to us more specious than sound. The applications did not become parts of the contracts until the contracts were made. They were not made until December 26, 1893, when McMaster accepted the policies and paid his first premiums. It is a custom so universal that it is within the knowledge of all men who have the slightest acquaintance with the business of life insurance to date the policies and to fix the day of the payment of the annual premiums earlier in the month than the day of the month upon which the policies happen to be accepted and the first premiums happen to be paid, because the policies are issued and dated at the home office of the company and some days usually intervene between that time and the date of their delivery to, and acceptance by the insured. There was therefore nothing unusual or extraordinary in the fact that the annual due date of the premiums was somewhat earlier in the month of December than the day in that month in which the policies were delivered to McMaster. Nor was the difference between policies, the due date of whose annual premiums was on December 12 and policies the due date of whose premiums was on December 26 very striking or important when the contracts were made and when both parties expected the premiums to be paid

according to their terms. The policies offered an extension of time of payment for one month in consideration of interest at the rate of five per cent per annum and that interest on the premiums on these policies for the eighteen days between December 12 and December 26 amounts to only twenty-six cents in each year. Thus it will be seen that the difference between the due date of the premiums and the date of the delivery of the policies was not extraordinary and the difference between an annual due date of December 12 and one of December 26 was not crucial when the contracts were made although now through the failure of the insured to comply with the terms of his contracts it has become grave. Turn now to the contracts. They consist of the applications and the policies and these must be read together. The applications provide that the premiums shall be paid annually or once in each year, but they do not provide on what day in each year they shall be paid and they are dated on December 12, 1893. The policies are dated on December 18, 1893, and they read that they are made in consideration of the applications "and in further consideration of the sum of twenty-one dollars, to be paid in advance, and of the payment of a like sum on the twelfth day of December in each year thereafter during the continuance of this policy," and that if the premiums are not paid within one month after December 12 in any year the insurance shall cease. The words which we have quoted which fix the dates when the premiums fall due are not tucked away on the backs of the policies but are written in plain terms upon their faces where a cursory reading would be certain to disclose them. The word "annually" which the applications contain signifies once in a year, but it does not signify at what time in the year, and it is by no means inconsistent with a stipulation in the same instrument which fixes that time. Leases, promissory notes, mortgages and many other contracts of like character provide for the payment of interest and installments of various kinds annually and also name the day in the years in which they shall be paid. One could not successfully maintain that these stipulations or the mere fact that the first installments were not paid until some days after they were due by the terms of the agreements could create any inconsistency or ambiguity in the terms, or any doubt of the meaning of such agreements. The policies and applications when read together are of the same character. They provide simply that the premiums shall be paid annually on the 12th day of December in each year and that if they are not so paid within one month after they are due the insurance shall cease. To our minds these provisions present no inconsistency no ambiguity, no doubt of their meaning and no basis for the application of rules of construction. The terms of the policies are clear and their meaning is certain.

83 Another position of counsel for the plaintiff in error is that this judgment should be reversed because the service of the notice of the amount of the second annual premiums, of the date when they fell due, and of the effect of a failure to pay them, was not well pleaded under the law of the State of New York upon this subject, which was made a part of the policies But the question is not here for our consideration. The service of the notice was clearly averred, whether with such accuracy and particularity that the plea would have been impervious to a demurrer it is not necessary to inquire, because this pleading was not challenged below and the court heard the evidence upon this subject without objection and found that the notice was sent "in accordance with the requirements of the statutes of the State of New York." When a case is tried by a Federal court without a jury and the resulting judgment is brought by a writ of error to an appellate court for review it is only "the rulings of the court in the progress of the trial of the case" and the sufficiency of the facts found to support the judgment that can be reviewed. Rev. Stat. section 700. In such a case this is a court for the correction of the errors of the court below only. As the question of the sufficiency of this pleading was never brought to the attention of, or ruled upon by the trial court, it certainly committed no error regarding it and there is nothing in this point for us to review or correct. *Mercantile Trust Co.* v. *Wood*, 19 U. S. App. 566, 571, 8 C. C. A. 658, 660, 60 Fed. Rep. 346, 348; *Bowden* v. *Burnham*, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. Rep., 752; *Norris* v. *Jackson*, 19 Wall. 125, 127; *Ins. Co.* v. *Folsom*, 18 Wall. 237, 249; *Cooper* v. *Omohundro*, 19 Wall. 65, 69; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Lehnen* v. *Dickson*, 148 U. S. 71. The judgment below is

Affirmed.

THAYER, Circuit Judge, concurring.

I concur in the order affirming the judgment below for the following reasons: Until the premium was paid on the policy in suit and the policy was delivered no agreement had been entered into which was binding either upon the insurer or the insured. Up to that point either party had the right to retire from the negotiation without liability to the other. When the policy was delivered and the negotiation was thereby consummated the policy became the best and, except in case of its loss or destruction, the only evidence of the agreement between the parties and in the absence of fraud or mistake neither party can be permitted to say that he did not assent to it. The acceptance of the policy by the insured is the highest evidence of his assent. The policy in terms provided that the subsequent premiums thereon during its continuance should be payable on December 12 annually but that a grace of one month would be allowed after the premium

fell due on condition that interest at the rate of five per cent was paid for the time the premium might remain overdue. These provisions of the policy were definite and certain and the insured, in view of his acceptance and retention of the policy, is presumed in law to have assented to them. It is true that he was privileged to avoid the provision of the policy fixing December 12 as the annual premium day by proof of fraud on the part of the insurance company or its agent, but I do not understand that the finding by the learned judge of the trial court establishes any such fraud as will in law serve to overturn the plain language of the contract. It is not claimed that the agent's request to the company to have the policy dated, when it should be issued, as of the same day as the application, was made with an intent to defraud the insured. Neither did the trial court find that the agent intended to deceive or mislead the insured when in response to the inquiry whether the policy was as represented and would insure him for thirteen months, he answered in the affirmative. Bearing in mind that the policy contained a stipulation allowing one month after each subsequent premium became due within which it might be paid, the company's agent doubtless believed that the policy did secure insurance for thirteen months counting from the premium day named in the policy and that it was in all respects such a contract as he had engaged to deliver. The findings, to my mind, do not create a suspicion of intentional deceit either on the part of the insurance company or its agent. Moreover, the finding shows that even if the deceased had not before read his policy he was distinctly advised at least a week before his death, which appears to have occurred on January 18, 1895, that by the terms of the policy the period of grace limited therein would expire on January 11, 1895, the premium having become due on the 12th day of the preceding month. The finding does not disclose that he made any objection at the time to this construction of the policy, which was clearly in accordance with its terms. It is a sound rule of law founded on the highest considerations of public policy which requires a person to read a contract before signing or accepting it, if he can read. Unless this rule is enforced written agreements of all kinds will become valueless as instruments of evidence. The duty resting upon one to read a contract before signing or accepting it is not so imperative however that if omitted it will render one bound under all circumstances by an agreement which he has signed or accepted. If one party to an agreement resorts to any fraud, trickery or artifice to prevent the opposite party from reading it before signing or accepting it, or knowingly makes any false representations concerning the terms of the agreement, or intentionally and with design to overreach the opposite party, so drafts a contract that it does not express the terms of the previous oral understanding or agreement—in all of these cases the negligence of one who signs or accepts a contract

without reading it is more excusable than the fraud of the opposite contracting party. But when the evidence shows no fraud of the kind last indicated nor mistake in drafting it, it is a wholesome rule which holds a party bound by a contract which he has signed, or accepted and retained in his possession for a considerable period, and which prohibits him from avoiding its provisions by pleading his own negligence. In the case at bar I am of opinion that no such fraud is disclosed by the findings as would justify a court in ignoring the plain language of the policy.

CALDWELL, Circuit Judge, dissenting.

The right decision of this case does not depend upon any technicality of law.

It is a case in which common sense and common honesty, and legal sense and legal honesty are at one.

It arises upon a contract of life insurance which must be interpreted according to the settled canons for the construction of such instruments, and the determination of the rights of the parties thereunder. In every contract of insurance the law prescribes to each party the observance of the strictest integrity and truthfulness. Insurance law when rightly expounded is always in harmony with honesty and sound morality. At the very beginning of insurance law in England there was infused into it through the influence of the civil law a different spirit from that which prevailed in other branches of the common law. Neither the maxim *caveat emptor* nor its spirit has found a lodgment in the law of insurance. If there is any part of our jurisprudence which produces exact justice in each individual case, it is the law of insurance. It is founded on truthfulness, honesty, and fair dealing. It never affords shelter or protection for fraud, falsehood or deception. In no other branch of the law, not even the law merchant, have the courts shown such merited deference to the rules, usages, and customs that prevail in the conduct of business. Insurance contracts are uniformly interpreted and enforced in harmony with the usages, business methods and common sense of honest business men, and the moral sense of all reputable men.

At the threshold of the case it would be well to call attention, once for all, to certain fundamental and indisputable propositions:

1. That the facts found by the lower court must be accepted by this court as absolute verity.

2. That the failure to find any fact, or the insufficient or imperfect finding of any fact, essential to maintain the judgment of the lower court is fatal to it.

3. That a statement of the legal effect of a document or paper which is not in the record nor made part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law upon the legal effect of an undisclosed document, and hence of no effect.

4. That Smith, who was soliciting these policies for the company, is under the Iowa law the agent of the company, "anything in the application or policy to the contrary notwithstanding"; and his statements and agreements in the course of his business in soliciting and delivering the policies and receiving the premiums are, in law, the statements and agreements of the company itself. *Assurance Society* v. *Clements*, 140 U. S. 226; *Indemnity Co.* v. *Berry*, 1 C. C. A. 561; *Cook* v. *Association*, 74 Ia. 746; *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S. 304; *New York Life Ins. Co.* v. *Russell*, 77 Fed. Rep. 94.

Contracts of life insurance are *sui generis*. A policy consists of a printed form which the company has framed and adopted for its use, and uses in all cases without change or variation. All that is necessary to be done to make one of these policies a completed instrument is to insert in the blanks left for that purpose, the name of the insured, the term of insurance, the amount and time of payment of the premium, the date of the policy and the signature of the company. The insured never sees the policy during its preparation, and never signs it. What he does see and sign is an application for the policy. This application is also on a printed form which the company has framed and adopted for its use and which it uses in all cases, and which is made part of the policy and is as obligatory on the parties as any other part of the policy. This application contains numerous questions which the insured must answer, and warrant his answers "to be full, complete and true." The insured did this and it is not claimed that his answers were not "full, complete and true." But the contention is that this duty to answer questions truthfully is not reciprocal; that while the applicant for insurance must answer the company's questions truthfully, the company has the privilege of knowingly returning false answers to the applicant's questions, and profiting by such false answers at the expense of the benificiary in the policy.

From the beginning to the end of the majority opinion, a policy of insurance is treated as though it were a contract for which there was no precedent and related to a subject about which neither of the parties ever before contracted, and in the preparation of which each party participated and had an equal voice and the provisions of which were as well known to one party as to the other, and which was signed by both; and the court applies to a contract of insurance, rules as harsh and technical as any that would be applied under the rule of *caveat emptor* to a trade between two horse jockeys.

What are the facts established by the findings? The seventh finding of fact is:

"By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered."

Here we have a definite, precise and concluded contract as to *when* the policies were to take effect. They were "not to take effect until the policies were delivered." This oral agreement as to when the policies should take effect was in complete accord with the express stipulation of the application, which is: "That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company." The premiums were paid and the policies delivered on the 26th day of December, 1893, and from that date, and not before, the policies were "in force" by the explicit provisions of the policies themselves, as well as by the terms of the oral agreement. The date when the policies took effect being settled beyond all cavil, the term or period of their duration is the next question. Each policy provided that:

"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

When had the policies "been in force three months"? As we have seen by the terms of the oral agreement, the policies were not to take effect until they were delivered, and the policies themselves stipulated that they should not be in force until the actual payment to and acceptance of the premiums by the company, which was coincident with the delivery of the policies. It is clear, then, that the policies went into effect and were "in force" on the 26th day of December, 1893, and that three months from that date—the policies having remained in force—the insured became entitled to the grace of one month in the payment of subsequent premiums, which extended the time of the payment of the next annual premiums to the 26th of January, 1895. The insured died on the 18th of January, 1895, eight days before the policies could be declared forfeited for the nonpayment of the second annual premium. There was never any thought or suggestion that the policies would not insure the life of the ap-

plicant for thirteen months from the date of the payment of the premiums. Confessedly, the period of twelve months and *seventeen days* was never in the mind of either party, or ever thought of by either party. From the very inception of the business it had been represented and understood that the policies would insure the life of the applicant for thirteen months from the time of the payment of the premiums and the delivery of the policies. This is conclusively shown by the third and fourth findings of fact, which are:

"3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading 'Benefits and provisions referred to in this policy' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid; during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts."

The insured wanted the full benefit of the thirteen months insurance, reckoning from the date of the payment of the first annual premiums; upon this subject he had been exacting and tenacious from the beginning, and to that end had required the agent to agree that the contract of insurance should "not take effect until the policies were delivered." And as we have seen, this condition was carried into and repeated in his application, which declares the policy "shall not be in force until the actual payment of the premium." But this was not all the insured did to make it sure that he would be insured for thirteen months from the payment of the premiums and the delivery of the policies. The ninth finding of fact is:

"The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

"The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth."

The question propounded by the applicant to the insurance agent was not an idle inquiry, and the answer to it not a mere casual statement. Nor was the answer, as is claimed, "preliminary information" or a mere "opinion" as to the legal effect of the policies. There was nothing preliminary about it, and it was not a mere expression of opinion, but a clear, positive, and distinct statement of a material, existing fact. The answer given by the agent can only appear on paper in words, but it was doubtless accompanied by "the story of looks and message of voices" common with soliciting agents which cannot be put on paper, but which add force and emphasis to one's utterances and induce confidence in his assurances. The most persuasive and effective falsehoods are told in acts, not in words.

But it is immaterial whether the answer of the agent was inspired by a fraudulent purpose or was the result of an honest mistake. Confessedly the minds of the parties never met and agreed upon the contract expressed in the policies. A mistake, no more than a fraud of the company or its agent, can bind the insured to a contract he never made.

No claim is made that the policy conforms to the terms of the application. The contention of the majority is that after receiving the application the insurance company "made a counter-proposition," and it is upon this alleged counter-proposition, differing as is confessed in a material respect from the terms of the application, that it is sought to uphold the clause of the policies over which this controversy arises. This claim is thus stated in the majority opinion:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a counter-proposi-

tion. It took the latter course. It rejected some parts of the applicant's proposition and made a counter-proposition." When, where, and how did the company make "a counter-proposition" to that contained in the application? There is no finding of fact to that effect, and for the facts in this case this court cannot look beyond the facts found by the lower court, it can add nothing to and take nothing from the facts so found. The application was on the company's standard form and the propositions and conditions contained therein, were the propositions and conditions the company itself had framed and to which it required the assent of the applicant for insurance as a condition of issuing the policies. And when the applicant subscribed to the application and delivered it to the company so far as related to the conditions and stipulations therein contained, the minds of the parties had met and were at one. It is not true that the company ever advised the insured that it had changed the propositions and conditions which it had itself inserted in his application, or that it would not insure the applicant on the basis of the propositions and conditions contained in the application. Nor did the company, at any time or place, offer or propose any other terms for the insurance. On the contrary, upon the receipt of the application, it made out, signed and transmitted to its agent policies of insurance which the agent assured the applicant conformed to their agreement and the requirements of the application. But in violation of the agreement that the policies would insure the applicant for thirteen months from the date of their delivery and the payment of the premiums, and in violation of the terms and conditions of the application which guaranteed policies for the same period, the insurance company had secretly and without the knowledge of the insured, inserted a clause in the policies which reduced the term of insurance to twelve months and seventeen days, and when it delivered the policies this fact was not only concealed from the insured, but he was told by the agent that the policies insured him for thirteen months—and this is what the majority of the court call making "a counter-proposition." What the court is pleased to call "a counter-proposition" was a fraudulent concealment of the fact that the policies varied in a material respect from the agreement made with the agent, and the requirements and conditions of the application. A counter-proposition is an offer *openly* made by one of the parties, of something for consideration and acceptance as a substitute for, or a modification of, a proposition previously made by the other party.

It is further said in the opinion of the court that, "the word 'annually' which the application contains, signifies once in a year, but it does not signify what time in a year." But the appl cation provided that the policies should not be in force until the first annual premiums were paid, and they were paid on the 26th of December,

1893. That this was the payment of annual premiums is conclusively established by the finding of the court that it was the payment in full of the "first annual premium." Obviously then, the next annual premium would be due one year from that date. Annual in this connection means on the recurrence of the same day in each year thereafter and not at some other or uncertain time during the year. Therefore, when the company inserted in the policy a clause making the premiums payable at a different time it inserted a provision in direct conflict with the terms of the application and the agreements of the parties. It is a fact found by the court that:

"There now appears on the face of the application, interlined in ink, the words, 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company."

When the insured signed the application and delivered it to the agent it was a completed document. It was the insured's application, and neither the company nor its agent could lawfully add to or take from it. The company could accept or reject the application as made, but it could not alter it. The insertion of this clause by the insurance agent after the insured had signed and delivered the application, and without his knowledge and consent, was an illegal act if not a plain and palpable forgery. It was an act which cannot prejudice the insured or benefit the company. No one can profit by his unauthorized alteration of an instrument after the discovery of the fact. The company evidently understood by this clause interpolated into the application by the agent that he wanted the 12th day of December fixed as the date for the payment of the annual premiums, and the company accordingly fixed that date in the policies as the time for the payment of the annual premiums and dated the policies their true date, namely, the 18th of December. By this extraordinary and unheard of action, the insured is made to pay a premium on the policies from the 12th of December whereas the policies were not signed or executed by the company until the 18th of December, and by their terms did not take effect until the payment of the first annual premiums on the 26th of December. Beyond all doubt, the applicant was not insured from the 12th of December, and yet from that day it claimed the thirteen months must be reckoned, and we are told that

they are policies not for thirteen months but for twelve months and seventeen days, a most uncommon term for life policies, which are rarely or never issued for a fraction of a month.

In *Equitable Life Association* v. *McElroy*, 28 C. C. A. 365, the jury found there was a valid verbal agreement of life insurance and that time was given for the payment of the premium, but a majority of the court in that case said: "The almost invariable custom is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid. Accordingly, where no policy of life insurance has been issued and no premium has been paid, there is a strong presumption that there was no contract and no intention to contract otherwise than by a policy made and delivered upon the simultaneous payment of a premium," and the verdict of the jury was set aside and a recovery denied. But when in this case the insured claims and proves by an express provision of his application now a part of the policies, that the policies were not to be in force for any purpose until the premiums were paid and the policies delivered, the court holds that as against the insured and for the purpose of shortening the term of insurance and defeating a recovery on the policies, that the policies were in force six days before they were signed, and fourteen days before they were delivered and the premiums paid. It is not pretended, however, that the applicant's life was insured during this time—the policies were only in force to shorten the term of his insurance, and to that extent relieve the company from liability. As applied by the court in this case, there is a want of reciprocity in the rule laid down in *Equitable Life Association* v. *McElroy*, *supra*, which does not commend it to our sense of right and justice. Judge Shiras in his opinion forcibly points out the injustice and unreasonableness of this claim. He says:

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"If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company after using the month's grace as an arrangement to secure insurance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies." *McMaster* v. *New York Life Ins. Co.* 78 Fed. Rep. 33.

And again:

"Can there be any doubt that when McMaster received the policies dated December 18, 1893, and paid one year's premiums thereon, he was justified in assuming that, if he died within one year from the

date of the policies, his estate would receive the indemnity which it was his purpose to secure, even though the policies did not contain the provision giving one month's grace on subsequent payments. Suppose McMaster had died on the 1st of December, 1894, less than one year from the date of the policies, would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1, 1894? That is exactly the claim now made by the defendant company. If the company, after accepting a proposition to insure McMaster on the basis of annual premiums, can make the second premiums payable in six days less than a full year—which is its claim in the present case—it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semi-annually." *McMaster* v. *New York Life Ins. Co.* 90 Fed. Rep. 40.

The interpolated clause in the policies contradicts and is inconsistent with the stipulations and conditions of the application, which are a part of the policies and the only part which the assured ever saw and assented to. It is a settled canon for the construction of policies of insurance, that when they contain contradictory, conflicting or inconsistent provisions, effect will be given to the provisions most favorable to the insured; and in cases where their construction is doubtful, the construction most favorable to the insured will be adopted. *National Bank* v. *Ins. Co.* 95 U. S. 673; *Grace* v. *American Central Ins. Co.* 109 U. S. 278; *Moulor* v. *American Life Ins. Co.* 111 U. S. 335; *American Surety Co.* v. *Pauly*, 170 U. S. 133; *Traveller's Ins. Co.* v. *McConkey*, 127 U. S. 661, 666; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 297; *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462.

No notice is taken of this rule by the majority of the court, although it is exactly applicable to this case and decisive of it. In *McGlother* v. *Prov. Mut. Acc. Co.* 32 C. C. A. 318, the majority of this court characterized this fundamental rule of construction which has been repeated, affirmed, applied and enforced by the Supreme Court of the United States in scores of cases, as a "much abused rule." As the rule has been more frequently and effectively applied by the Supreme Court of the United States than any other court, it may be inferred from the remark quoted that the doctrine of the Supreme Court does not meet the approval of the majority of this court, and will not be applied by them in any case. Certain it is that they have done more than ignore the rule in this case—they have *inverted* it, and where the provisions of the policy are inconsistent or conflicting, they have given effect to the provisions most favorable to the insurance company, and wherever the meaning of the policies is doubtful, they have resolved the doubt in favor of the insurance company.

The company made no objection to the stipulations and conditions of the application or to the agreement made with its agent, and made no counter-proposition, but proceeded to issue and tender its policies upon the application as made. When the policies were tendered under these circumstances, the insured would have been entirely justified in paying the premiums and accepting the policies without reading them. He had a right to presume that the period of insurance named in the policies conformed to the agreement and to the stipulations and conditions of his application, and to that effect are the authorities, as we shall presently see. When the period of insurance has been agreed upon, it is the almost universal usage for business men to pay the premium and accept their policies without reading them. Under the doctrine laid down by the majority, if a man were to make a written application for a policy of insurance on his house for one year and the company should write the policy for one month only, and tender that and receive a year's premium, and the insured going on the reasonable assumption that the policy conformed to his application, should accept the policy and put it away in his safe without reading it, his policy would be effective for one month only. But the insured in this case did not, as he might well have done, rest on the reasonable assumption that the policies insured him for the perion of thirteen months as agreed upon and called for by the stipulations and conditions of his application, but he applied to the company's agent to know if they did so insure him and was answered that they did; and thereupon, in reliance upon the truth of this answer and in the belief that the policies insured him for thirteen months as his application called for, he paid the first annual premiums and laid the policies away without reading them.

Upon this state of the case the court holds that by the mere acceptance and retention of the policies without reading them, the insured is estopped to show the truth of the transaction. The question is not whether the finding of facts establishes the mistake or fraud, but whether the mistake or fraud being conclusively established by the finding of facts, the court will declare the insured is estopped from availing himself of the truth by the mere receipt of the policies and putting them away without reading them in reliance upon the truth of the agent's answer and the stipulations of his applications. It must not be forgotten that there is no claim or pretense that the policies in fact expressed the contract of the parties—the finding of facts precludes any such claim—the contention is, that by receiving the policies under the circumstances mentioned the insured is "conclusively presumed" to have assented to all their provisions and will not be heard to say to the contrary. The rule for the application of estoppels is thus inverted and applied in favor of the company, when it is obvious that it is the company that is estopped from setting up

the defense relied on. Estoppels are invoked to prevent and relieve from fraud, not to shield and protect it. The most frequent occasion for invoking the doctrine is where one party makes a representation upon the faith of which the other party acts and pays money or changes his position or refrains from doing something he otherwise would do. In all such cases the party making the representation is estopped from contesting its truth. It will be perceived at a glance that the estoppel in this case applies to the insurance company and not to the insured. The insured made no representation to the company, and the company parted with no money or other valuable thing on the faith of any false statement that he made. Nor did it do or omit to do anything on account of the insured putting away the policies without reading them. But on the faith of the solemn assurance of the company's agent that the policies insured him for thirteen months, the insured parted with his money and refrained from reading his policies and from taking out policies in other companies Upon the faith of the truth of the agent's representations, the insured rested confidently in the belief that he had made provision for his family in the event that he died at any time within thirteen months from that date. It is said the insured was guilty of culpable negligence in placing any reliance on the truth of the agent's statement. But the law will not hear any man complain that another has too implicitly relied on the truth of things he has himself stated. He will not be heard to say, "It is true I misrepresented the facts to the insured and by so doing induced him to pay for and accept without reading policies which insured him for a less period than that agreed upon, but he ought not to have trusted to my word, he ought to have known I was unworthy of belief."

The rule of the court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud as a high exhibition of business tact and skill, and reserves its censures for the innocent and trusting victim of the fraud because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falsehood to the prejudice of the man who trusted him. It makes confidence and bunco games respectable and elevates the sharper who practices them to a plane of equality with honest and reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts which were designed to prevent fraud into the most powerful agencies for the perpetration and protection of fraud. In this case the insurance company, in effect, receives a reward of $5,000 for its falsehood and fraud, and a

penalty of $5,000 is imposed upon the beneficiary named in the policy because the insured trusted in the truth of the company's representations.

It is undoubtedly true that a written contract is presumed to express the agreement of the parties—but this is not a conclusive presumption, and the exceptions to the rule are as well understood and clearly defined as the rule itself. No writing, however solemn, can be made a vehicle for fraud or convert a mistake into verity. The case at bar, upon the facts found, falls within the well-defined exception to the rule as shown by all the authorities. No apology is made for demonstrating the truth of this assertion by somewhat extended quotations from controlling authorities.

In *Insurance Company* v. *Wilkinson*, 13 Wall. 222, the insured had signed and delivered to the insurance company an application for a life policy, in which the agent of the company had written down a false answer to a question which the insured had declined to answer. The insured, without knowing the agent had written down an answer to this question, signed the application without reading it, and it was made the basis of the policy which was issued. The company made the same contention in that case that the company makes in the case at bar, namely, that parol evidence could not be admitted to prove the facts and that the insured was conclusively bound by the contents of his written application. But the Supreme Court held that the act of the agent in writing down the answer was to be imputed to the company and that it could not estop the insured from showing the facts by parol evidence by its own fraudulent act though he had signed the application without reading it. In delivering the unanimous judgment of the court, Mr. Justice Miller said:

"Passing then to the second branch of the case. The defendant excepted to the introduction of oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

"The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconception, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been

long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. * * * It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country."

In *Equitable Insurance Co.* v. *Hearne*, 20 Wall. 494, the terms of the policy were agreed upon by letter. The policy issued varied from the agreement, the insured accepted and retained it without reading it and the company contended that having done so, he was bound by its provisions, although they differed from the terms of the agreement; but the court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief."

The company in that case seems not to have thought of the expedient of calling the policy which varied from the terms of the agreement, a "counter-proposition."

In *Palmer* v. *Hartford Insurance Company*, 54 Conn. 488, 509, 510, the court say:

"But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written contract of all the terms, conditions and stipulations, which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is

delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, when the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

"The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read."

In *Hay* v. *Star Fire Ins. Co.* 77 N. Y. 235, Chief Justice Church, speaking for the Court of Appeals, said:

"It was bad faith on the part of the defendant to change so radically the terms of the policy, and deliver it as a policy simply renewing the old one without notice of the change. A party whose duty it is to prepare a written contract, in pursuance of a previous agreement, to prepare one materially changing the terms of such previous agreement, and deliver it as in accordance therewith, commits a fraud which entitles the other party to relief according to the circumstances presented. * * * Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when for the first time, he was informed of the peculiar terms of the provision."

In *Bidwell* v. *Astor Insurance Company*, 16 N. Y. 266, the court said:

"That the contract of insurance agreed to be made by the defendants was such in its terms as the plaintiffs have alleged in their complaint, has been found by the judge and is conclusive upon us. The fact on which the appellants rely, that the policy actually made out was in the plaintiff's hands for a considerable time, and until after the loss had occurred, was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiff's allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiff. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights short of the period fixed by the statute of limitations."

In *Albany City Savings Institution* v. *Burdick*, 87 N. Y. 40, the Court of Appeals said:

"It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistake of the parties, however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties."

The court then cites the case of *Botsford* v. *McLean*, 45 Barber 478, where in a transaction one of the parties was to execute four notes bearing interest. He executed and delivered four notes, but only two of them bore interest. The payee without reading the notes accepted them and put them away. The court proceeds:

"The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest and accepted the same believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest purposely abstained from calling the vendor's attention to the fact. It was held that there was a mistake on one side and fraud upon the other, and that the two notes should be reformed so as to conform to the actual agreement between the parties, and the decision was affirmed in this court in 1870. In that case there was a certain degree of negligence in not reading the two notes. It is said by the learned counsel for the plaintiff, in the argument before us, that there was artifice used in that case to induce the plaintiff to believe that the two notes were drawn with interest, that artifice being in drawing and placing before the plaintiff the first two notes payable with interest, by which the payee was thrown off his guard; but that circumstance was not the basis of that decision and does not distinguish that case from this. There was nothing there to prevent the payee from reading the notes, and he had abundant opportunity to do so. If he had read them, the mistake and fraud would have been discovered. There was at most, in substance, the representation that the two notes were drawn with interest; and if that was false, the means were at hand for its easy and ready detection. So in this case; Mrs. Burdick intrusted Martin to draw the deed, and he was bound to have it drawn so as to express the agreement between the parties; and when he brought and delivered the deed to her, it was in effect a representation to her that the deed had been so drawn. She was not bound to assume that he might be practicing a fraud upon her, or representing a falsehood, and she cannot be charged with negligence in believing confidently that he was acting in good faith and telling the truth.

In omitting to read the deed, she was no more in fault than the plaintiff was in the case above cited, in omitting to read the two notes.

"It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have trusted or believed him. * * * If the rule were otherwise, the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil-doers."

In *Kister* v. *Insurance Co.* 128 Pa. State, 553, the Supreme Court of Pennsylvania say:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Howard Ins. Co.* v. *Bruner*, 23 Pa. 50; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

In *Gristock* v. *Insurance Co.* 87 Mich. 428, the Supreme Court of Michigan say:

"Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In *Strohn* v. *The Detroit and Milwaukee Railway Co.* 21 Wis. 562, the plaintiff had a verbal agreement with the defendant railway company as to the terms of shipment of a quantity of freight. The freight was delivered to the railway company and afterwards, upon demand, the company delivered to the plaintiffs bills of lading therefor. These bills of lading contained conditions of shipment inconsistent with the verbal agreement of the parties. The plaintiffs having received and retained these bills of lading without reading them or knowing their contents, the railway company insisted that they were bound by the conditions contained in the bills of lading, which had been received without objection. In answer to this contention, the court said:

"Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely differ-

ent character, and present it to the party without directing his attention expressly to it and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received." And to the same effect is *Boorman* v. *American Express Co.* 21 Wis. 154.

In *McElroy* v. *British America Assur. Co.* 94 Fed. Rep. 990, 1000, the Circuit Court of Appeals for the Ninth Circuit say:

"It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides."

In *Fitchner* v. *Fidelity Mutual Fire Association*, 103 Iowa, 276, the Supreme Court of that state say:

"The insured ordinarily rely upon the agent to properly set out the facts in the applications, and Laub did as men usually do, in assuming that the defendant's agent had done his duty. *Stone* v. *Insurance Co.*, 68 Iowa, 737; *McComb* v. *Insurance Co.* 83 Iowa, 247. The mere failure of the assured to read his application, or the copy of it in the policy, does not establish negligence. *Bennett* v. *Insurance Co.* 81 Iowa, 321; *Donnelly* v. *Insurance Co.* 70 Iowa, 693; *Boetcher* v. *Insurance Co.* 47 Iowa, 253. Nor is the mere omission to read the policy negligence. *Barnes* v. *Insurance Co.* 75 Iowa, 11; *Jamison Insurance Co.* 85 Iowa, 229; *Boetcher* v. *Insurance Co. supra.* Laub had no reason to suppose the policy and application were drawn differently than understood."

Citations to the effect of the foregoing might be multiplied indefinitely, but the excerpts quoted are enough to establish beyond all controversy that the doctrine of the majority is not the law. No verbal dexterity can weaken or evade the overwhelming force of these decisions. They conclude the question. Not one case cited by the majority is an authority *on the facts of this case.* Even the decision of this court when this case was here on a bill to reform the policy, is not in point in this case because some of the material facts found by the Circuit Court in this case, and which are conclusive upon this court now, were disputed and denied by this court in the equity case. In *Firemen's Fund Insurance Co.* v. *Norwood*, 16 C. C. A. 136, the question under discussion was decided by this court after full

argument and consideration. The opinion in that case is exactly opposed to the opinion of the majority in this case, and yet the majority opinion nowhere refers to the Norwood case. If the court intends to overrule the Norwood case, it should have the courage and candor to say so. It is extremely unfair to the profession and the public, for an appellate court to put forth two opinions diametrically opposed to each other without noticing the fact and advising the profession which opinion they are to regard as the law of the court. The Norwood case was cited and its doctrine approved by the Circuit Court of Appeals for the Ninth Circuit in *McElroy* v. *British America Assur. Co. supra*, and also in the Sixth Circuit in the case of *London and L. Ins. Co.* v. *Fisher*, 34 C. C. A. 503.

There is another ground upon which the case should be reversed and the plaintiff in error awarded a new trial. The defendant in error is a New York corporation. A statute of that state in force at the time these policies were issued declares:

"No Forfeiture of Policy Without Notice. No life corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereof on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly

addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. 1, par. 92.

In *Baxter* v. *Insurance Co.* 119 N. Y. 454, the Court of Appeals of that state speaking of this statute and its effect upon the policy of life insurance issued under it said: "This statute was part of the contract in question and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case the defendant was claiming a forfeiture of a policy for non-payment of the premium when due. It was not shown by the insurance company that the notice required by this statute had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice had been served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy are not then dependant upon the payment of the premium on the day named therein, but upon the payment within thirty days after the notice has been given. * * * The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served the assured was not in default because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of the premiums. * * * Before defendant could raise any question in regard to the non-payment of the August premium, it was necessary to show that it had complied with the statute by serving a notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium." See also, *DeFrece* v. *Insurance Co.* 136 N. Y. 151; *Phelan* v. *Insurance Co.* 113 N. Y. 147.

In *Griffith* v. *Insurance Co.* 101 Cal. 627, *Johnson* v. *N. Y. Life Insurance Co.* 78 N. W. Rep. (Iowa) 905, *New York Life Insurance Co.* v. *Dingley*, 93 Fed. Rep. (U. S. Circuit Court of Appeals, 9th Circuit) 153, *Rosenplanter* v. *Provident Sav. Life Assur. Soc.* 96 Fed. Rep. 721 (U. S. Circuit Court of Appeals, 6th Circuit), the same statute is considered and the interpretation given it by the New York courts adopted.

The burden of proof to show that this notice was given rests upon the insurance company. It must show a strict compliance with the terms of the statute before it can assert a forfeiture. This is conceded by the defendant in error, and in its answer claiming a forfeiture of the policies, it is alleged that notice was duly mailed to the insured at least fifteen days and not more than forty-five days before the premiums were due on the policies, in the form required by the statute. But there is no finding of fact to support

this allegation. The only finding of fact on the subject reads as follows:

"10th. That not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

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It will be observed that there is a total failure to find the facts show a compliance with the statute by the company. One requirement of the statute is that the notice shall be sent "at least fifteen and not more than forty-five days prior to the day when the same is payable." The only finding on the subject is, "that n t later than Novem' er 17, 1894, notice was sent." But how much earlier than November 17, 1894, was it sent? It might have been sent the first of July, and this finding would be true. It is not upon such a finding that a court can declare a forfeiture. The rule is absolute and without an exception that the special findings of fact of the lower court must distinctly and specifically find every fact essential to support its judgment. Nothing can be supplied by intendment.

The next clause of this finding, namely, that the "notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statute of the State of New York" is fatally defective for the reason that it states a mere conclusion of law, and finds no fact whatever. The contents of the notice are not given, and the notice is nowhere set out. It was the duty of the lower court either to make the notice a part of its finding or set out its contents specifically so that this court could determine whether it was "in accordance with the requirements of the statute of the State of New York." Under the New York statutes the forfeiture of a policy for the non-payment of premiums does not depend, as we have seen, upon the non-payment of the premiums according to the terms of the policy, but upon their non-payment after the notice prescribed by the statute has been given. What that notice must contain to make it effectual will be seen by reference to the statute copied above, and its requirements need not be repeated here. See cases *supra*. The inadequacy of the finding on this point is forcibly illustrated by the facts disclosed in the record in the equity suit now a part of the records of this court. A reference to that record discloses the fact that the notice which was given was fatally defective in at least two particulars. *Rosenplanter* v. *Provident Sav. Life Assur. Soc. of N. Y.* 96 Fed. Rep., 721; *New York Life Ins. Co.* v. *Dingley*, 93 Fed. Rep. 153. It is to be regretted that the majority of the court have

deemed silence the best method of disposing of the question of the sufficiency of this finding.

The judgment of the Circuit Court should be reversed, and the case remanded with instructions to grant a new trial.

Filed December 11, 1899.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

 Judgment.

And on the eleventh day of December, A. D. 1899, in the record of the proceedings of said United States Circuit Court of Appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1899. Monday, December 11, 1899.

Fred A. McMaster, Administrator of the estate of F. E. McMaster, deceased, Plaintiff in Error,
No. 1202. vs.
The New York Life Insurance Company.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the New York Life Insurance Company have and recover against Fred A. McMaster, Administrator of the estate of F. E. McMaster, deceased, the sum of twenty dollars for its costs herein.

December 11, 1899.

Petition for Rehearing.

And on the twentieth day of January, A. D. 1900, a petition by Plaintiff in Error for a rehearing of said cause was filed, in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

NO. 1202.

DECEMBER TERM, A. D. 1899.

FRED. A. McMASTER, ADMINISTRATOR,

Plaintiff in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

PETITION FOR REHEARING.

Your petitioner, Fred A. McMaster, administrator of the estate of F. E. McMaster, deceased, plaintiff in error, believing and representing himself to be aggrieved by the decree of this Honorable Court in the above entitled cause, respectfully asks a rehearing and reargument thereof, to the end that the said decree may be reversed, and for grounds thereof would respectfully state:

I.

Your petitioner would ask a rehearing upon the entire cause, and upon all the questions presented whether considered in the separate opinions of the Court or not.

II.

The Plaintiff in Error is Entitled to Invoke the Doctrine of Equitable Estoppel Against the Insurance Company.

Judge Thayer in his concurring opinion says:

"If one party to an agreement resorts to any fraud, trickery or artifice to prevent the opposite party from reading it before signing or accepting it, or *knowingly* makes *any* false representations concerning the terms of the agreement, or intentionally and with design to overreach the opposite party, so drafts a contract that it does not express the terms of the previous oral understanding or agreement—in all of these cases the negligence of one who signs or accepts a contract without reading it is more excusable than the fraud of the opposite contracting party."

From this we will extract one sentence:

"If one party to an agreement * * * knowingly makes any false representations concerning the terms of the agreement * * * the negligence of the one who signs or accepts a contract without reading it is more excusable than the fraud of the opposite contracting party."

The assured is dead. The only available evidence is that of the hostile agent of the insurance company. It is hardly to be supposed that such agent would proclaim from the witness stand his "false representations concerning the terms of the agreement" in as plain English as would an impartial witness. Neither "the fraud of the opposite contracting party" nor the assumed "negligence" of the assured should be permitted to escape the attention of the Court. It is not out of place, although of course not in itself authoritative, to quote a part of the

evidence of the hostile and unwilling witness, the agent of the insurance company.

"Q. In what form did you have them (the policies) when you delivered them to him as to being in envelopes or tied together?

"A. There were five separate policies and they were in five separate envelopes, and the five were placed in one large envelope and delivered to me at the office of the company, and I delivered them to McMaster in that form.

"Q. Did he take them from you?

"A. Yes, sir; he did.

"Q. State just what he did.

"A. He took them out of the (large) envelope and spread them out in his hands and started to take one out of the envelope, and some one come in and interrupted, and he said: 'Smith, are these policies as you represented and agreed they would be?'

"Q. You may state both what he did and what he said.

"A. He took them in his hands, as I stated before, and started to take one of the policies from the envelope and some one came in and interrupted us, and he laid them down on the desk, and he said: 'Smith, are these policies the same as you represented?' and I said, 'Yes, sir; they are.' And he said, 'Do they insure me for thirteen months?' and I said, 'Yes, sir; they do.' He said, '*You have read them over and found that they are the same as you have represented them to me?*' and I said, 'Yes;' and he said, 'Very well; I will pay you for them;' and he did at that time, and placed the policies in a pigeon hole of the desk" (unread).

From such evidence the Court made its 9th finding, as follows:

"The five policies, enclosed in envelopes, on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the

agent the full first annual premium, or the sum of twenty-one dollars on each policy, and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company, as hereinbefore set forth."

The agent had read the policies. He knew that his "representations concerning the terms of the agreement" were false, and had been rendered so by his interpolating into the applications the words "please date policy same as application." It is admitted that this illegal interlineation wrought the grief of this controversy. It is strange that against the express provision of the application that there was to be no insurance *until* the delivery of the policies, the company should have made the premium payable six days *before* the policies were dated or written. It must be unusual to so fix the premium day unless oral insurance is given. That illegal interlineation and the company's action thereon caused the loss in this case. The fault is wholly that of the company. Why should it profit thereby? He had so illegally changed the application to crowd the policies into the December, 1893, business, and thus earn for himself a bonus. It is true that the agent did not lay violent hands on the assured to prevent him from reading the policies. He accomplished their delivery and the payment of the premium in a more certain and seductive way. His controlling impulse was to get possession of the $105 in premiums and get away with it, and earn the bonus and his commission. He had reason to fear that the discovery by the assured of his deception might wholly defeat the transaction, and so he took advantage of the interruption to prevent the assured from reading and considering the

policies, got the cash, saw the policies pigeon-holed unread, and then went on his way rejoicing. While under the authorities we do not need to go so far, still we submit that the agent of the company at the critical moment designedly, intentionally and knowingly resorted to fraud, trickery and artifice to advance his own interest and to deceive the insured and prevent him from reading the policies.

Did the company through its agent, Smith, "knowingly make any false representations concerning the terms of the agreement?" This is Judge Thayer's crucial test.

Upon us seems to fall the task of demonstrating an axiom.

Smith was the agent who promised thirteen months' insurance backed up by the company's *printed circulars* (3d finding) and through instructions. He knew the contents of these particular policies. He assumed to state their terms as to the controlling question of thirteen months' insurance from actual perusal. He gave no advice or warning to the insured of a "counter proposition." He plainly and positively stated that there was no counter proposition. He positively stated to the insured to induce the payment of the premiums that the policies "were as represented," and that "they would insure McMaster for the period of thirteen months." He saw the policies pigeon holed away for safe keeping unread, and took $105 in premiums, knowing that the transaction was consummated and the premiums paid in reliance on his truthfulness and honesty. The result was accomplished by misleading, deceit and fraud. The agent's conduct is at variance with every element of good faith dealing and

fair play, and yet the Court falls helpless before it, and smites it not.

III.

It is Enough if the Conduct of the Agent Naturally Resulted in Accomplishing a Legal Fraud.

Judge Thayer says: "The findings to my mind do not create a suspicion of *intentional* deceit either on the part of the insurance company or its agent."

The finding is that when the insurance company presented the policies to the assured, in delivery, he asked the agent "if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, McMaster paid the agent the full first annual premium * * *, and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity of reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinbefore set forth."

The Court found the ultimate fact from the evidence already quoted in part. "The terms of the policies are clear and their meaning is certain" says Judge Sanborn. Well, then, it follows that the agent knowingly made a "false representation concerning the terms of the agreement," and the rule laid down by Judge Thayer is satisfied. All this is proven, in spite of the deprivation of the only other witness by death, out of the mouth of the unwilling, hostile, guilty agent.

All the members of the Court admit deceit, but Judge Thayer qualifies the term by the word "intentional." Do not the findings establish intentional deceit? Even if it should be conceded, which it is not, that it was permissible for the insurance company to deliver policies in silence and without comment, notice or advice, which by their terms presented a materially different and "counter proposition," still it cannot be the law that when such delivery was challenged by the persistent questioning of the assured and answered by the positive and authoritative representations as to the existing terms of the policies by the agent, who had read and knew the terms of the policies, and who saw the assured accept the policies unread, relying on his representations and statements—that under such circumstances the insurance company is not estopped to invoke the rule that the writings are the only and conclusive proofs of the actual agreement.

What man of ordinary prudence after these questions had thus been asked and answered by the agent of the company, who under the Iowa law spoke with binding authority, and who was familiar with the terms of these policies, and an expert on the terms . language of life insurance, the very person who had urged the inducing features of the policies—the "nice provision" of thirteen full months of insurance, reinforced by printed "circulars issued by the company," and emphasized by the form of the policy itself, as the Court finds—would have detained the agent for three hours to read all five policies? To have done so would have been to give the lie in the very teeth of the agent, the friend and neighbor of the assured. To require that that should have been done is to establish a rule that all men must act on the presumption that all other men are liars.

These were not representations *de futuro*, were not mere expressions of opinion, nor statements of conclusions of law; but they were statements concerning the terms of the policies as existing facts, avowedly known to the company, made to induce the acceptance of the policies, and of all of which the assured was admittedly ignorant.

Every assumption in the concurring opinion of Judge Thayer which controlled his action is, we submit, an assumption unwarranted in the case, and we appeal to this Court and to that distinguished jurist in particular, to review this case.

Thirteen full months of insurance was the dominant inducement, and any representations as to that matter either in the policies or out of them was material. It was dishonest and fraudulent to present the "counter proposition" without even advising the assured that the policies contained a "counter proposition" on the heralded "nice provision," and it was doubly so to stand up and in the face of the assured, in response to his exacting and searching inquiries, proclaim as strong as language is capable of putting it, that the policies contained no counter proposition, but by their terms furnished thirteen months of insurance for the first premium, and were in all respects as represented. The very dash and boldness of the enterprise only emphasized and made more certain of success the actual deceit and fraud practiced.

Justice rebels against this decision. No man can read it and not say that it *ought* to be the other way. It inflicts the death penalty for the alleged negligence of the assured, whose only fault was that he trusted and relied on the representations of the representative of the insur-

ance company, and dismisses with cold technicalities the unwhipped deceit and the legal fraud.

Between the lines of the ruling opinion itself there breathes a shock to the warm impulse of the writer and a wish that the conclusion might be otherwise, but that it cannot because of the alleged effect that must be given to a written contract in deference to an ancient rule. We submit that the evolution of equity practice and the rules of evidence have refined and distinguished away the rigor of the rule, before which the majority of this Court fell prostrate, to such a degree as to sanction a decision in this case that would permit law and conscience to go hand in hand. There is ample warrant and authority for the application of the doctrine of equitable estoppel.

This Court can apply an equitable estoppel in this case.

Barnard vs. *German American Seminary*, 49 Mich., 444.
Kirk vs. *Hamilton*, 102 U. S., 777.
John Shilleto Co. vs. *M'Clung*, 45 Fed., 778.

And see also cases cited in support of proposition V.

IV.

No Sufficient Effect Has Been Given to the 12th and 13th Findings.

For Judge Sanborn to say that the provisions of the policies are neither inconsistent nor ambiguous, but clear and certain and free from doubt, and for Judge Thayer to say of the agent who read the policies, who was the very agent who solicited the insurance and delivered the

policies and received the cash premium for his company and the bonus for himself; that "the company's agent doubtless believed that the policy did secure insurance for thirteen months counting from the premium day named in the policies (which was the one thing he agreed was not to be done), and that it was in all respects such a contract as he had engaged to deliver," makes all comment as needless as it would be difficult.

Judge Thayer says that the findings do not disclose that the assured objected to the construction placed upon the policies by Miss Ball as stated in the 11th finding. The findings, it is true, do not disclose that he parleyed or entered into a legal controversy with this lady collector. But the evidence of the company also resulted in the 12th and 13th findings, which present a conclusion and satisfactory objection to her construction, and show that the assured was relying on the policies being in force three days before his death, and subsequently to the time that the alleged forfeiture became complete, namely, by postponing the taking of other insurance because of the pendency of this particular insurance. No judge of this Court mentions these two findings, and, yet, they disclose that the assured on January 15, 1895, was risking the support of those dependent upon him on the strength of his belief and faith that the policies in suit secured him thirteen months of insurance, a fact that speaks louder than words against the random evidence of the insurance company's collector given three years after the alleged conversation took place, and which, even if truly given, would not abrogate the vested right of estoppel.

This case must be considered and decided on the rights acquired by the assured under the payment of the first year's premium, not on what acts were necessary to

be performed by him to keep the insurance in force in subsequent years. The question is, how much insurance did the assured buy with the first premium? Not when did the policies become lapsed as to subsequent years. Even if it should be conceded that the renewal right had lapsed as to subsequent years when the assured died, still there is no inconsistency in the claim that a recovery may be had on the policies under rights existing by virtue of the payment of the first premium. For the purpose of determining the rights of the parties growing out of the payment of the first premium, the policies may still be alive, although dead for every other purpose.

V.

The "Intent" is Not Always a Controlling Element in the Doctrine of Estoppel.

Judge Thayer speaks of an "intent to defraud" and "intentional deceit" as though either or both were necessary to sustain an equitable estoppel. But neither the intent to defraud or mislead, nor a fraudulent purpose is essential.

The following quotation, from *Leather Manufacturers National Bank* v. *Morgan*, 117 U. S., 96, establishes the proposition that neither a fraudulent purpose nor an intent to deceive or mislead is essential.

"In Continental Nat. Bank v. Nat. Bank of the Commonwealth, 50 N. Y., 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were re-

stricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who is estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylor v. Van Loan, 15 Wend., 308.' The general doctrine, with proper limitations, was well expressed in Freeman v. Cooke, 2 Exch., 658, and in Carr v. London & N. W. R. Co., L. R., 10 C. P., 307. In the first of these cases it was said by Parke, B., for the whole Court, that '*If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true*, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect."

"The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

Dickerson vs. *Colgrove*, 100 U. S., 580.

The Ottumwa Bell, 78 Fed. Rep., 643.

"It is not necessary to equitable estoppel that the party should design to mislead."

Blair vs. *Waite*, 69 N. Y., 116, approved in 117 U. S., 109.

"It is well settled that there need not be any design to defraud in order to constitute an estoppel."

Pitcher vs. *Dove*, 99 Ind., 178.

"It will be seen that fraud is not given as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision should be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as always essential would at once strike out some of the most familiar and best established instances of equitable estoppel."

2 Pom. Eq. Jur., §805.

"An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."

Thompson vs. *Simpson*, 28 N. E. R., 632 (N. Y).

In *Dair* vs. *U. S.*, 16 Wall., 1, 4, Justice Field, in a case where an estoppel was urged, said:

"It is, accordingly, established doctrine that, whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part or injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

"Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words, and when a person's words are thus reasonably understood and justly acted upon by another, such person cannot be heard to aver to the contrary as against the other."

Sessions vs. *Rice*, 70 Iowa, 309.

The law, therefore, proceeds upon the theory that the purpose and intent are to be evoked out of the natural result, and we submit that the findings of the Court are sufficient to sustain both a fraudulent purpose and an intention to deceive, and certainly, that they are sufficient

to answer the requisites of the *Morgan* case, *supra*. In short, they find that a *legal* fraud was perpetrated, and that is enough.

The finding that the agent did not attempt to prevent the assured from reading the policies, and that the assured had full opportunity for reading them, does not overcome the fact that the representations there and then made, in direct response to rigid inquiry, by one who must have known his representations to be false, certainly so if the contract was unambiguous, did in fact deceive and mislead the assured, who accepted the policies in reliance on such representations, as the Circuit Court found.

11 *Am. & Eng. Ency. of Law*, 2nd Ed., 431 *et seq.*, and cases.

The finding that the assured had full opportunity to read the policies does not militate against an estoppel. The agent did not tender policies responsive to the agreement, but, as Judge Sanborn says, "counter propositions." This fact the agent did not disclose, and he certainly knew that it would be deceiving the assured to take his money on a counter proposition without the assured even knowing that a counter proposition was involved. Silence would have constituted deceit and false representation, intolerable in honest business dealing; but when the insurance company spoke under rigid and searching inquiry, it was irrevocably subjected to the highest duty to speak the truth. It failed to disclose a counter proposition; it put McMaster off his guard by bold positive statements, that, coming from an expert in such matters, resulted, as in law it must be presumed, to have been intended it should result, in deceit and legal fraud.

THE ONE CONTROLLING INDUCEMENT UNDER WHICH THE INSURANCE WAS BOUGHT FROM THIS COM-

PANY WAS OMITTED FROM THE COUNTER-PROPOSITION. The agent reached for the money with which to fatten his bonus under the most positive representation of thirteen months' actual insurance under the terms of the policy, and left the policies in McMaster's possession, pigeon holed and unread.

Such dealing this Court seems to justify under no harsher name than a mere counter proposition. Surely this Court has decided some other case; for the admitted facts of this case seem to us to have been misapprehended. The full opportunity for reading the policies ceases to be controlling when the insurance company did not remain merely passive, but affirmatively acted and spoke to mislead and deceive.

This Court says that the company presented an alleged counter proposition. The Circuit Court found that the company said there was counter proposition in the policies. Judge Thayer says that if the agent knowingly made any false representations concerning the terms of the agreement, then the defendant would be estopped.

The policy is made up of the proposition (the application) and the "counter proposition" (the policy), and *both* are the contract (5, p. 12). This Court, in finding a proposition and a counter proposition all in *one* instrument, finds both inconsistency and ambiguity, and knows it not.

VI.

The 10th Finding as to Notice is Insufficient to Authorize or Support the Judgment.

This case was tried by the Circuit Court without the intervention of a jury, and the judgment was rendered

upon a special finding of facts. That being true, this Appellate Court will only consider "the sufficiency of the facts found to support the judgment," that is, whether the judgment rendered is right.

Randle v. *Barnard*, 81 F. R., 682.

It will be conceded that the insurance company had the burden of showing that a legal and sufficient notice was given to the assured warning him of the approaching maturity of the premiums and demanding their payment under penalty of a forfeiture of the policies.

The 10th finding is as follows:

"That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York."

The statement in this finding that the notice was given "in accordance with the requirements of the statutes of the state of New York" is not a finding of an ultimate fact, but a mere conclusion of law, and does not overcome the burden of proof imposed on the company.

U. S. v. *Harris*, 77 Fed., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., pp. 1038-1046.
Daube v. *Phil. Ry. Co.*, 77 F. R., 715-6.

The silence of a special finding as to an essential fact is equivalent to a finding against the party upon whom the burden rests of proving such fact.

U. S. v. *Harris*, 77 F. R., 821.

The New York statute (quoted in full in the dissenting opinion of Judge Caldwell), as to the form, matter

and requisites of the notice, is controlling and dominates the policies.

The finding is, we submit, subject to the following specific objections, which render it insufficient to support the judgment of the Circuit Court.

(1.) The finding does not show that the notice required to be given under the New York statutes of 1892, chapter 690, article 1, paragraph 92, was given. Under this statute the notice had to be given "at least fifteen *and not more than forty-five days* prior to the day when the same (premium) is payable."

The application declares this to be a New York contract (p. 12). The policies refer expressly to this statute (p. 10). The policies are made payable in New York City, and were there advised, issued and dated. Proofs of death were also to be made there.

The finding that notice was given "not later than November 17, 1894," is not the finding of an ultimate fact, and utterly fails to find a sufficient and legal notice.

Under this finding the notice may have been sent more than forty-five days prior to the day when the premium was payable, in which event it would be void.

(2.) The Circuit Court found that the notice was sent to Frank E. McMaster. The New York statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured." For anything that appears the notice may have been sent to Alaska in open form by a clerk of the office or some private person on a bicycle or even afoot.

(3.) The finding does not state, as the New York statute requires, that the letter enclosing the notice was

mailed and properly addressed to the assured "at his or her last known postoffice address, postage paid" (meaning, prepaid).

(4.) The finding does not show, as the New York statute requires, (a) that a written or printed notice was given; (b) stating the amount of the premiums due on the policies; (c) the place where the premiums should be paid; (d) and the person to whom the premiums should be paid; (e) nor does it show whether the "notice sent" was duly addressed and mailed to the insured; (f) at his last known postoffice address; (g) postage prepaid by the insurance company, or by an officer or collector thereof; (h) not more than forty-five days prior to the day when the premiums were payable.

(5.) The finding does not show when the company notified the insured to pay the premiums, nor when the company claimed the premiums became due and payable.

(6.) The finding does not show whether the notice sent stated that unless the premiums then due were paid to the company before the day when they became due the policies would become forfeited and void.

The New York statute is strict and exacting in reference to the contents of the notice. All of the facts covered by the foregoing objections are essential to a legal and sufficient notice. But there is absolutely nothing in the finding to indicate that the notice contained any of the matters required, with the possible exception of notice of the coming due of the premiums, at some unstated time. Such a notice would be wholly insufficient because not containing a statement of the matters required to be

shown by the statute and the following cases of consruction:

Baxter vs. *Brooklyn Life Ins. Co.*, 119 N. Y., 450.
Defrece vs. *Ins. Co.*, 136 N. Y., 151.
Phelan vs. *Ins. Co.*, 113 N. Y., 147.

The "Due Date" is Ambiguous, Indefinite and Elastic and the Allowance of Thirteen Months' Insurance Does Not Vary the Terms of the Policies.

VII.

Article 1, paragraph 92, chapter 690, of the laws of 1892, of the state of New York, is set out in full in the dissenting opinion of Judge Caldwell, and need not be repeated.

The opinion in *Baxter* v. *Brooklyn Life Insurance Co.*, 119 N. Y., 454, seems to hold that the *due* date is not fixed save by the expiration of thirty days *after* giving the required notice. It holds that "the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium." The dissenting opinion emphasizes the point in these words:

"The construction placed on the statute in the prevailing opinion that by its operation the premium *does not become due until after notice and expiration of the thirty days* * * * is, I think, untenable. The premium is due from the time it becomes due according to the terms of the policy, and remains due at all times thereafter until actually paid."

The majority holding is, therefore, that the premium *does not become due* until after notice and expiration of the thirty days.

The provisions as to payment of premiums and grace (rec., pp. 8 and 9) say: "If any premium is not thus paid on or before the day *when due*, then (except as hereinafter or otherwise provided) this policy shall become void and all payments previously made shall remain the property of the company."

This provision does not refer specifically nor necessarily to the words "twelfth of December" in the face of the policies (rec., p. 6), but to the *due date* as fixed by the New York statute and the previous construction of the highest Court of that state.

The due date of the premium under the Baxter case is fixed by the New York statute, which is a part of the contract, and may postpone the due date beyond December 12. Should not a construction be given to these two paragraphs (payment of premiums and grace, rec., pp. 8 and 9), consistent with the controlling New York statute?

That statute, under the *Baxter* case, makes the due date ascertainable, not from the language of the policies, but by the expiration of thirty days after the giving of the statutory notice. Is there not sufficient force in this contention, reinforced as it is by the language of the *Baxter* case, to justify and support a finding that the due date is an unfixed and elastic date, and, that, therefore, the thirteen months' insurance could readily be given by the company as agreed without violating any of the terms of the written contract, which must include the provisions of the statute, by merely adjusting the date of the giving of the notice to the representations made by it in its printed circulars and by its agent under intsructions?

It must be presumed that the company in putting out the language of the policies, under the head "pay-

ments of premiums" (rec., p. 8), knew of the *Baxter* and subsequent cases. If the company could easily have given a notice in harmony with its representations and the policies, then it should now be estopped to give one that abrogates the promises on which it induced the business.

VIII.

In our former brief we endeavored to show on authority that the New York statute became a commanding part of the policies. The words, "If any premium is not thus paid *on or before the day when due*, then this policy shall become void," is without meaning, unless read in connection with the statute. It was not possible for the parties to agree, and to make the agreement effective, that the policies should become void if the second premium was not paid on the 12th day of December. The statute of New York could not thus be annulled and set aside by agreement of the parties.

In order, therefore, to give this provision sense and a meaning consistent with the law, the words "when due" should refer to that unfixed and elastic maturity of thirty days after the expiration of the giving of the statutory notice, for only at such a time and under the fulfillment of such conditions was it possible for the parties to agree *effectively* that "then this policy shall become void." These words should be construed in the light of the company's knowledge of the provisions of the New York statute, and of the New York decisions, and if one construction tends to establish an agreement that would be unlawful or beyond the ability of the parties to make, and another an agreement that is in harmony with the statute, and within the ability of the parties to make,

then the latter construction should prevail. If such a rule of consruction is adopted for this case, we submit that the words "when due" should mean thirty days after the expiration of the giving of the statutory notice, because only at such a date was it possible for the parties to agree that "this policy shall become void, and all payments previously made shall remain the property of the company."

No specific time was fixed for the giving of the notice. The *time* of giving the notice was left to the future determination of the company. A construction that makes an agreement mean sense and law is better than a construction that is at war with both. The policies do agree in binding effect that the notice shall not be so given as to fix the *due* date *before* December 12, but do not agree that the notice will not be so delayed as to fix the due date *after* December 12, and as the month of grace is intended as a gratuity it should be added to the thirty days after notice.

IX.

In the light of *New York Life Insurance Company* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Provident Sav. & Life Assur. Society*, 96 Fed. Rep., 721, we ask the further attention of the Court to the provision at the foot of page 8 of the record. This provision is not printed on the face of the policies, but must be searched for among the debris of endorsements, and this is the provision, if any, that works havoc on the question of thirteen months' insurance. It is manifest that in these cases the best legal talent on insurance in the country could not devise a valid notice under the policies and the New York statute, and yet Judge Sanborn says that all the provisions are clear

and unambiguous. As a matter of mental test, we would ask the Court to endeavor to frame for itself a notice that would have satisfied the requisites of the entire situation.

Suppose the notice provided (in the language of page 8): "If the premium is not thus paid on or before the day when due (to-wit: December 12, 1894), then, except as hereinafter otherwise provided, this policy shall become void, and all payments previously made shall remain the property of the company." Evidently such a notice would be invalid, because it would have misled the assured, and because it would not be true in fact. This form presupposes that the words "when due" mean December 12th.

Let us try it again. Let the notice contain a provision that if the premium is not thus paid on or before the expiration of thirty days after the mailing of the notice, then, etc., this policy shall become void. This assumes that the words "when due" mean when the policies are ripe for forefeiture under the New York statute, because it assumes to fix a date when the parties might legally contract to give forfeiture effect under the terms "then this policy shall become void." This form is preferable to the first attempt, but still would be insufficient, because it would not of itself fix the date, and would require the insured to ascertain when the mailing had taken place, or if it fixed a date of mailing, the assured would still be entitled to the statutory provision, which would control even against a date fixed in the notice itself. More than this, the second attempt would be insufficient if mailed, say forty-five days prior to December 12th, because the statute was not intended to cut short but only to postpone the payable date.

A study of the statute as construed in both of the above cited cases shows the difficulty of framing a satis-

factory notice. Considering the face of the policy, the payment of premiums clause, and the New York statute together, we urge upon the Court that there is palpable inconsistency and ambiguity. It is proof enough of this difficulty of interpretation and conflict of provisions that the insurance company itself has issued millions of notices such as that set out on page 155 of 93 Federal Reporter, and has never issued a single valid notice. The notice in this case was just like the one in the *Dingley* case, and we contended that it was absolutely bad, but the Circuit Court was not convinced. It should be said, however, that the *Dingley* and *Rosenplanter* cases are subsequent to the decision of Judge Shiras.

Take the provision as to grace. Neither the first nor the second of the foregoing attempts at the making of a notice would be sufficient because this month of grace must be considered. The month of grace is supposed to be a gratuity, and should be beyond the statutory period.

If the finding of the Circuit Court means that the notice was mailed on some day on or between October 3d and November 17th, when would the month of grace begin, if ever? If the mailing was on October 3d, then difficulties arise. If on November 17th, then the law extends payment, and the month of grace must either be postponed or a part of it chopped off.

At any rate three possible dates assert themselves. The date December 12th, the date thirty days after the expiration of the mailing of the notice, and the date that would indicate the expiration of the month of grace, and the combination of these three matters seems to have successfully taxed the ingenuity of the insurance company; and yet, in the face of the fact that the insurance

company itself could not draft a notice after reading the policies in the light of the New York statute, this Court makes bold to say that for Tom, Dick and Harry the policies are clear, certain, unambiguous, not doubtful or difficult of construction, inconsistent or contradictory. We ask to be indulged in the suggestion that even this Court would experience difficulty in preparing a legal notice that would stand the fire of litigation under the provisions of the policies and the New York statute. The *Dingley* case shows that the defendant can't do it, and that fact alone ought to win this case by showing the difficulty of interpretation.

The New York statute says (93 Federal Reporter, 155) that the notice shall also state that "unless such premium * * * *then due* shall be paid * * * by or before the due day it *falls due*, the policy and all payments thereon shall become forfeited and void," except, etc. What do the words "then due" and the words "day it falls due" in the above quotation mean when read in connection with the thirty day provision, the grace provision, the payment of premiums clause, and the date on the face of the policy?

Taking the clause at the foot of page 8 again, and assuming that the notice in this case was mailed on the 17th of November, what would be done with the second paragraph of the "payment of premiums" clause? If the date, December 12th, is substituted for the words "the day when due," then that notice would be invalid, for the policy could not thus be rendered null and void, for the statute would enforce the thirty days. What then would become of the other grace provision? Would the grace given as a gratuity be absorbed by the statutory notice in whole or in part? Does the month of grace, at the top

of page 9 of the record, found on the back of the policy, overlap or add to the statutory grace?

Inasmuch as the *Dingley* case (93 F. R., 153) rests on New York cases older than this policy, we would ask whether the Court, after reading all these cases from the Baxter case to the Rosenplanter case (96 F. R., 721), will not be constrained to say, as the majority said in Fidelity & Casualty Company v. Lowenstein (97 F. R., 20), that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

This provision of the policies and the statute seem to have been sufficiently ambiguous to tax the genius of Courts in majority and dissenting opinions, and to have overtaxed the ingenuity of the eminent counsel of the insurance company itself, for that company has not yet been able under these assailed provisions to shape a notice that the Courts have found sufficient. Under such a state of affairs, in the light of the New York statute and the decisions we confidently urge our contention that the terms of the policies on the crucial questions are uncertain, difficult of interpretation, inconsistent, doubtful and ambiguous. If the Court should hesitate to adopt all of this, it can and should go at least as far as Judge Thayer did in the *Lowenstein* case, and say that the question of ambiguity "is of sufficient gravity to be resolved in favor of the insured."

HENRY J. TAYLOR,

FRANK E. GILL,

Solicitors and of Counsel for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, Henry J. Taylor, counsel for the plaintiff in error and petitioner for rehearing in the above entitled cause, do hereby certify that the above and foregoing petition for rehearing is made in good faith, and in the earnest belief that the petition should be granted. And I further certify that I have carefully examined the matters set forth in said petition for rehearing and reargument, and I believe the claims and grounds for said rehearing, as therein stated, are true and well founded and sufficient in point of law; and I further certify that said petition is not made for the purpose of vexation or delay.

Sioux City, Iowa, January 17th, 1900.

HENRY J. TAYLOR,
Counsel for Plaintiff in Error and Petitioner.

Order Denying Petition for Rehearing.

And on the twenty-second day of January, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals, is an order denying the petition for a rehearing in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

FRED A. MCMASTER, Administrator of the Estate of F. E. McMaster, Deceased, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE COMPANY. } No. 1202.

In error to the circuit court of the United States for the northern district of Iowa.

MONDAY, *January* 22, 1900.

This cause came on this day to be heard upon the petition for a rehearing filed by counsel for the plaintiff in error.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

January 22, 1900.

Certificate.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and thirty-one, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinions of said United States circuit court of appeals, in a certain cause wherein Fred A. McMaster, as administrator of the estate of F. E. McMaster, deceased, was plaintiff in error and The New York Life Insurance Company was defendant in error, No. 1202, December term, A. D. 1899, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I do further certify that I have attached hereto and return herewith the original writ of certiorari, with my return thereto.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this second day of April, A. D. 1900.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which Fred A. McMaster, administrator of the estate of F. E. McMaster, deceased, is plaintiff in error and The New York Life Insurance Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of Iowa, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 523, October term, 1899. Fred A. McMaster, adm'r, &c., *vs.* The New York Life Insurance Co. Writ of certiorari. Filed Apr. 2, 1900. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In obedience to the command of the within writ of certiorari, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in the city of St. Louis, Missouri, this second day of April, A. D. 1900.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 17,637. Supreme Court U. S., October term, 1899. Term No., 199. Fred A. McMaster, adm'r, &c., petitioner, *vs.* The New York Life Insurance Company. Writ of certiorari and return. Filed April 4, 1900.